In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-97

CALIFORNIA RETAIL LIQUOR DEALERS ASSOCIATION,
a California corporation,
Petitioner

vs.

MIDCAL ALUMINUM, INC., a California corporation,
Respondent

BAXTER RICE as Director of the Department of
Alcoholic Beverage Control of the State of California
Respondent

PETITION FOR WRIT OF CERTIORARI
to the Court of Appeal of the State of California
in and for the Third Appellate District

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The Petitioner, CALIFORNIA RETAIL LIQUOR DEALERS ASSOCIATION, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California in and for the Third Appellate District entered in this proceeding on March 26, 1979.

OPINIONS BELOW

The Court of Appeal's denial of Petition for Rehearing was entered on April 19, 1979. The opinion of the Court of Appeal, entered March 26, 1979, is reported at 90 Cal.App.3d 979 (1979) (Appendix A). The California Supreme Court's denial of Petition for Hearing was entered on May 24, 1979 (Appendix B).

JURISDICTION

The opinion of the Court of Appeal of California, Third Appellate District, was entered on March 26, 1979. The Court of Appeal denied a timely petition for rehearing on April 19, 1979. On May 24, 1979, the Supreme Court of California denied a timely petition for hearing.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257(3).

QUESTIONS PRESENTED

I

Are California statutes, enforced by the California Department of Alcoholic Beverage Control, that require the brand owners or sellers of wine to retailers within the State of California to establish minimum *consumer* prices and file such prices with the state regulatory agency as part of a comprehensive regulatory scheme clearly articulated and affirmatively expressed in the Alcoholic Beverage Control Act governing the use, sale, possession and distribution of alcoholic beverages within the state, and which also require the retailers to sell to consumers at prices no lower than those thus established, invalid under the Sherman Antitrust Act?

II

Are California statutes, enforced by the California Department of Alcoholic Beverage Control, that require the brand owners or sellers of wine to retailers to establish prices for the sale of wine to *retailers* within the State of California, file such prices with the state regulatory agency and require that wine be sold to retailers at the prices filed, all of which requirements are a part of a comprehensive regulatory scheme clearly articulated and affirmatively expressed in the Alcoholic Beverage Control Act governing the use, sale, possession and distribution of alcoholic beverages within the state, invalid under the Sherman Antitrust Act?

III

Does the "state action" exemption place the requirements of the California Alcoholic Beverage Control Act relating to "fair trade" prices on sales of wine to consumers and the "price-posting" of wine prices from wholesalers to retailers outside the reach of the Sherman Antitrust Act?

IV

Does the Twenty-first Amendment confer upon a state the right to enact and enforce statutory provisions regulating the prices at which wine shall be sold at both wholesale and retail within the state unfettered by the Commerce Clause or the Sherman Antitrust Act?

STATUTORY PROVISIONS INVOLVED

California Business and Professions Code, Division 9, (Alcoholic Beverage Control Act), Chapter II (Wine Fair Trade Contracts and Price Posting):

§ 24682. Compliance with price schedules and fair trade contracts.

No licensee shall in this state sell or resell to a retailer, and no retailer shall in this state buy any item of wine except at the selling or resale price thereof contained either in an effective price schedule or in an effective fair trade contract as authorized by Chapter 10 of this division [commencing with Section 24749], unless otherwise provided in this chapter.

No licensee in this state shall sell or resell to a consumer any item of wine at less than the selling or resale price thereof contained either in an effective price schedule or in an effective fair trade contract as authorized by Chapter 10 (commencing with Section 24749) of this division unless otherwise provided in this chapter.

Wine sold pursuant to a bona fide order accepted on the last business day of any month may be delivered to the purchaser, at the price in effect during said month, within two business days immediately following the last day of the month in which the sale was made.

§ 24866. Price schedules and fair trade contracts: Growers, wholesalers, and rectifiers.

Each wine grower, wholesaler licensed to sell wine, wine rectifier, and rectifier shall:

(a) Post a schedule of selling prices of wine to retailers or consumers for which his resale price is not governed by a fair trade contract made by the person who owns or controls the brand.

(b) Make and file a fair trade contract and file a schedule of resale prices, if he owns or controls a brand of wine resold to retailers or consumers.

STATEMENT OF THE CASE

California, like the other states in the Union, has enacted various statutes under the 21st Amendment to the United States Constitution relating to the sale, use, possession, distribution, importation, taxing, etc., of alcoholic beverages. In California these provisions are in the Alcoholic Beverage Control Act (Act). (Business & Professions Code, section 23000 et seq.)

In addition to restrictions on the issuance and number of licenses, "tied house" restrictions, restrictions on advertising, exclusive territory provisions, the designation of trading areas, and many other regulations and restrictions governing alcoholic beverages, the California Act also contains provisions for resale price maintenance for distilled spirits and beer at the consumer level. Wine is required to be sold to consumers at minimum prices contained in a "fair trade contract" or an "effective price schedule." The failure to establish minimum retail prices, as required by state law, or the sale by a retailer at a price below the prices thus established is a violation of the Act and results in disciplinary action by the Department of Alcoholic Beverage Control (Department) which may result in revocation of the license involved.

In 1978, the California Supreme Court, in *Rice v. Alcoholic Bev. etc. Appeals Board,* 21 Cal.3d 431, (*Rice*), in a 7-0 decision, after having upheld the validity of the minimum consumer price provisions of the Act on at least four previous occasions,[1] reversed its position and declared

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[1] *Allied Properties v. Department of Alcoholic Beverage Control* (1959) 53 Cal.2d 141; *Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control* (1966) 65 Cal.2d 349; *Samson Market Co. v. Alcoholic Bev. etc. Appeals Bd.* (1969) 71 Cal.2d 1215; and *Big Boy Liquors, Ltd. v. Alcoholic Bev. etc. Appeals Bd.* (1969) 71 Cal.2d 1226.

the price maintenance statute covering distilled spirits invalid as violating the Sherman Antitrust Act (15 USC, section 1.) (Appendix C.)

In *Rice,* a retailer sold distilled spirits to a consumer at prices less than the minimum prices established and filed with the Department. The California Supreme Court based its declaration of invalidity solely on federal grounds. It held that if the conduct would otherwise be violative of the Sherman Antitrust Act, a Court must "balance" the interests involved in enforcing the Sherman Antitrust Act against the interests of the state in enacting and enforcing a statute regulating the sale of alcoholic beverages within the state. The California Supreme Court further held that even though the conduct of the manufacturers in setting the minimum prices was required by California statutes and regulations and enforced by state officials, the statute did not qualify for the "state action" exemption from the Sherman Antitrust Act.

A petition for rehearing before the California Supreme Court in the *Rice* case was filed by the Director of the Department of Alcoholic Beverage Control (Director) which was subsequently denied. The Director did not seek a writ of certiorari from the United States Supreme Court. Since the Director was the only "losing" party, the federal questions on which the decision was based were not brought before the United States Supreme Court.

The same statute that requires the establishment of minimum prices for distilled spirits also relates to beer, and the Director ceased enforcement of minimum retail prices

to the consumer in the case of both distilled spirits and beer. The wine statutes relating to consumer prices, unlike those covering beer and distilled spirits, provide for fair trade contracts.

After the *Rice* case, the Alcoholic Beverage Control Appeals Board (Appeals Board), an administrative agency which reviews decisions of the Department, affirmed disciplinary action against a licensee charged with selling wine at prices below the minimum consumer prices. The Appeals Board noted, however, that it felt the wine consumer price statutes to be invalid just as it had earlier ruled the distilled spirits statute to be invalid in the *Rice* case.[2] (The California State Constitution now prohibits an administrative agency from declaring a statute unenforceable on the basis that federal law prohibits its enforcement until a California Appellate Court has so ruled. Article III, Section 3.5 of California Constitution, approved June 6, 1978.)

This Appeals Board decision was reviewed by a California Court of Appeal. That Court held the consumer minimum wine prices were likewise invalid and "for the reasons stated in *Rice,* must also fall." (*Capiscean Corporation v. Alcoholic Bev. etc. Appeals Bd.,* 87 Cal.App.3d 996.) (Appendix D.)

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[2]The Appeals Board, on May 31, 1979, in affirming a decision of the Department imposing discipline on another licensee, commented that it felt the wholesale to retail price posting requirements for beer (Bus. & Prof. Code § 25000) and the provision requiring written agreements between beer manufacturers and beer distributors designating territorial limits for the distributors (Bus. & Prof. Code § 25000.5) were likewise invalid under the Sherman Antitrust Act. (Appendix E.)

The Director did not petition for a rehearing before the Court of Appeal in the *Capiscean* case nor did he petition for a hearing before the California Supreme Court. Neither did the Director seek a writ of certiorari from the United States Supreme Court and, as in *Rice,* there was no other party who could seek review from the United States Supreme Court of the purely federal questions involved in the Court of Appeal's decision in *Capiscean.*

The instant case arises since California, like some 14 other states in this Union, in its Alcoholic Beverage Control Act requires that the prices at which *wholesalers* sell to *retailers* be established by the brand owner or wholesaler and filed with the Department. (Appendix F.) No alcoholic beverage, including wine, may be sold to a retailer unless a price schedule, and for wine, a fair trade contract, is filed with the Department. Additionally, the wholesaler must sell to the retailer at the prices thus established. Violation of any of these provisions can result in suspension or revocation of the offender's license by the Department.

The wholesale to retail and retail to consumer price provisions for wine are lumped together in two statutes as shown under the heading "Statutory Provisions Involved" in this Petition. This is different than the situation with beer (Bus. & Prof. Code, § 25000) and distilled spirits (Bus. & Prof. Code, § 24756) where separate, specific statutes cover only the *wholesale* to *retail* price posting.[3]

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[3]In yet another challenge to the Act, an original proceeding was commenced on July 3, 1979 in the same California Court of Appeal that decided the instant case. It is alleged in *Farmers Markets, Inc. v. Baxter Rice,* 3 Civil 18743, that sections 24756 and 25000 are likewise invalid under the Sherman Antitrust Act and enforcement should be restrained. The contention is based on the *Rice* and the instant decisions.

Both the *Rice* and *Capiscean* cases involved disciplinary actions against licensees by the Department at the administrative level, appeals to the Appeals Board and review by the Court of Appeal. Until the Appeals Board issued its opinion reversing the Department's decision in the *Rice* case, there was no need for participation or intervention in the case by any segment of the alcoholic beverage industry. Since under California law, intervention is not generally permitted on appeal, there were no intervenors in the *Rice* case or the *Capiscean* case. This situation left the Department as the only party seeking to uphold the law. In the present case, since the proceeding in the Court of Appeal was an original writ proceeding, in effect seeking declaratory relief, intervention was proper and allowed, therefore providing the first opportunity for Petitioner herein to become a party to a case involving the basic federal question of the validity of the statutory scheme for regulating alcoholic beverages in California under the Sherman Antitrust Act as it relates to minimum consumer prices at retail and the prices from wholesale to retail for wine.

Petitioner, CALIFORNIA RETAIL LIQUOR DEALERS ASSOCIATION (CRLDA) is a trade association comprised of over 3,000 of the independent retail liquor establishments in California. Respondent, MIDCAL ALUMINUM, INC. (MIDCAL) is a wholesale distributor of Gallo wine in Southern California. Respondent, BAXTER RICE, is the director of the Department of Alcoholic Beverage Control of the State of California.

MIDCAL sold wine to a retailer at prices less than that posted with the Department, and sold other wine to a re-

tailer for which no prices had been posted with the Department. The Department filed an accusation against MIDCAL charging these violations. MIDCAL stipulated to the truth of the factual allegations, and agreed that "The Department may, subject to a judicial determination of the constitutionality of Section 24850 et seq., Business and Professions Code and Rule 101 of the Chapter 1, Title 4, California Administrative Code, impose a monetary penalty or suspension of [petitioner's] licenses as provided in Section 24880 of the Business and Professions Code."

Thereafter, respondent MIDCAL filed an original proceeding seeking a writ of mandamus in the State Court of Appeal restraining Director from enforcing the provisions of the Act relating to wholesale and retail prices of wine.

After briefs were filed and oral argument presented the Court of Appeal, stating that "We are bound by the decisions of the California Supreme Court," [referring to *Rice*], directed the issuance of a peremptory writ of mandate ordering the Director to "refrain from enforcing the fair trade and wine price posting provisions of the Alcoholic Beverage Control Act."

The petitioner, CRLDA, [Intervenor below] petitioned the Court of Appeal for a rehearing which was denied. Petitioner thereafter filed a petition for hearing with the California Supreme Court. That petition was denied, without comment, on May 24, 1979.

Petitioner then applied for and was granted a stay of issuance of the peremptory writ of mandate from the Court of Appeal for the purpose of seeking the issuance of a writ of certiorari from the United States Supreme Court. (Appendix G.) That stay was extended by the Court of Appeal on June 27, 1979 to July 20, 1979. (Appendix H.)

REASONS FOR GRANTING THE WRIT

I

THE STATE COURT DECISION IS CONTRARY TO DECISIONS OF THIS COURT DEFINING THE SCOPE OF THE STATE'S AUTHORITY TO REGULATE ALCOHOLIC BEVERAGES WITHIN A STATE'S BORDERS UNDER THE TWENTY-FIRST AMENDMENT.

The position taken by the California Court of Appeal in this case and the basis for its decision is best described by the following quotation from that decision, found at page 984, footnote 4 (Appendix A page A-7):

> ". . . The California Supreme Court carefully considered whether the California liquor price maintenance scheme was within the state action exception or saved by the Twenty-first Amendment, and concluded that neither exception applied. (*Rice*, supra, 21 Cal.3d at pp. 441-444, 447-457.) We are bound by that decision."

The resultant decision is contrary to both the Webb-Kenyon Act (27 USC § 122) and cases decided by this Court involving the application of the Twenty-first Amendment to state regulation in the field of alcoholic beverages. The Court of Appeal confined its decision to a reliance on the California Supreme Court decision in *Rice* and thus adopted the Supreme Court's exclusive reliance on its interpretation of the applicable federal law.

This misinterpretation and misapplication of the rule enunciated by the various United States Supreme Court

cases not only has created great chaos and uncertainty in the California alcoholic beverages regulation, but will have such an effect in the various other states in the Union that have similar laws as discussed elsewhere in this petition.

The California Supreme Court prior to the *Rice* case had on four occasions upheld the validity of the price maintenance provisions of the Act. (See Statement of the Case.)[4] Except for its attempt to reconcile the decisions in those earlier cases with its decision in the *Rice* case, the California Supreme Court based its decision exclusively on its interpretation of the applicability of the Sherman Antitrust Act and its discussion was confined to the effect of the Twenty-first Amendment on the power of the state to regulate alcoholic beverages and the "state action" exception to the Sherman Antitrust Act.

Having based its decision exclusively on its interpretation of federal law, in connection with its discussion of the Twenty-first Amendment's effect on the California regulatory scheme, the California Court adopted, for alcoholic beverage regulation, what may be the traditional approach for giving effect to the Commerce Clause in the typical state economic regulation situation, but one which has never been applied to alcoholic beverage cases. The Court adopted what it considered to be a "balancing" test. This test, as misapplied by the California Supreme Court to the situation in the *Rice* case, is perhaps best exemplified on

[4]Including the case of *Big Boy Liquors, Ltd. v. Alcoholic Bev. etc. Appeals Bd.* (1969), supra, in which it was contended that the California retail price maintenance scheme was contrary to the Sherman Antitrust Act and in which Justice Mosk (who also wrote the decision in *Rice*) wrote the decision and upheld the validity of the alcoholic beverage statute involved.

page 448, wherein the California Supreme Court announces its new rule for alcoholic beverages as follows:

> ". . . When a statute enacted pursuant to the Twenty-first Amendment conflicts with an enactment based on the Commerce Clause, we must balance the policies furthered by each in order to determine which should prevail."

And again, on page 453:

> ". . . Rather, as *Hostetter* and *Sail'er Inn* command, we must balance California's interest in promoting temperance and orderly marketing conditions by the methods set forth in section 24755 against the policy underlying the Sherman Act."

That "balancing" is precisely what the California Supreme Court did is demonstrated by the following quotation from page 451 of its *Rice* decision:

> "Therefore, we must undertake a balancing process in the present case. We must ascertain what policies are furthered by the state system of permitting producers to fix retail prices, whether the retail price maintenance provisions clearly vindicate those policies, and whether and to what degree the policy underlying the Sherman Act is undermined by the state's program."

That this "new" approach by the California Supreme Court is contrary to the law as laid down by the United States Supreme Court in a number of cases is not open to serious question. Nor is there any question that the Court of Appeal in the instant case adopted that "new" approach as the rationale for its decision in stating that it was "bound by that decision."

In *California v. LaRue,* 409 U.S. 109, decided in 1972, this Court reversed a three judge court which had held that regulations of the Department of Alcoholic Beverage Control were in conflict with the First and Fourteenth Amendments. The following quotation, at page 114 of the *LaRue* decision, demonstrates the inconsistency and incorrectness of the California Supreme Court's decision in *Rice* when compared with the law as laid down by this Court:

> "While the states, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare and morals. In *Hostetter v. Idlewild Liquor Corp.,* 377 U.S. 324, 330 (1964), the Court reaffirmed that by reason of the Twenty-first Amendment 'a state is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders.' "

This Court, in *Seagram & Sons v. Hostetter,* 384 U.S. 35, 41 (1966) emphasized the position of the Twenty-first Amendment in the scheme of the regulation of alcoholic beverages as follows:

> "Consideration of any state law regulating intoxicating beverages must begin with the Twenty-first Amendment, the second section of which provides that: 'The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.' "

As support for its "balancing" approach, the California Supreme Court relies on two cases; *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1 and *Hostetter v. Idlewild Liquor Corp.* (1964) 377 U.S. 324. Neither case supports the proposition for which it was urged by the California Supreme Court.

In *Sail'er Inn,* the sole question was whether or not the California statute prohibiting the employment of female bartenders was valid under the Fourteenth Amendment to the United States Constitution. The California Supreme Court ruled the statute was invalid. The United States Supreme Court has consistently taken an approach similar to that taken by the California Supreme Court in the *Sail'er Inn* case, in situations involving fundamental rights such as the Fourteenth Amendment and due process clause, even though the statutes interfering with fundamental constitutional rights were contained in regulations relating to alcoholic beverages. This is illustrated by the case of *Craig v. Boren* (1976) 429 U.S. 190, where an Oklahoma statute specified different drinking ages for men and women. This Court correctly ruled that the statute was unconstitutional under the equal protection clause. Likewise, in *Wisconsin v. Constantineau,* 400 U.S. 433 (1971), the fundamental notice and hearing requirement of the due process clause of the Fourteenth Amendment was held applicable in striking down a Wisconsin statute providing for the public posting of names of persons who had engaged in "excessive" drinking without giving notice and an opportunity to be heard to the persons so identified. The regulation and enforcement of the prices at which alcoholic beverages are required to be sold to either the consuming

public or to retailers simply do not fall in the same category as those situations involving the equal protection clause or the due process clauses of the Fourteenth Amendment.

In *Hostetter,* the Court was concerned with a state regulation which applied to liquor destined for consumption in a foreign country. *Hostetter* involved interstate and foreign commerce which the Court held was a different situation than liquor sales that involved activity within the state's border. This distinction between intra-state and foreign commerce by the United States Supreme Court was made clear in the *Seagram & Sons* case which was decided two years after *Hostetter.* That the *Idlewild* case should not be interpreted to restrict the state's broad regulatory power over liquor traffic within its borders is well illustrated at page 42 of *Seagram & Sons* where this Court stated:

> "Unlike *Idlewild,* the present case concerns liquor destined for use, distribution, or consumption in the State of New York. In that situation, the Twenty-first Amendment demands wide latitude for regulation by the state."

The situation in *Seagram & Sons* was very similar to that in the instant case in that it involved the price affirmation statutes of New York which additionally require the posting of the prices from wholesale to retail just as the California sections involved in this instant petition do.

The following quotation from *Seagram & Sons* is particularly appropriate in the instant matter in view of the wholesale to retail price posting provisions of the California Act which were declared invalid in the instant case:

> "The bare compilation, without more, of price information on sales to wholesalers and retailers to support the affirmations filed with the State Liquor Authority would not of itself violate the Sherman Act." (At page 45.)

The California Supreme Court, in its decision in *Rice,* recognizes that there is contrary federal authority to the position it is taking in the *Rice* case on the effect of the Twenty-first Amendment on alcoholic beverage regulation within a state. At page 450 of its opinion, in footnote 11, the California Supreme Court concedes that the Department's argument supporting the retail price maintenance provisions, based upon the traditional approach to cases arising under the Twenty-first Amendment is contrary to the position the Court is taking that the interests of the Sherman Antitrust Act and a statute enacted pursuant to the Twenty-first Amendment should be "balanced" one against the other. The California Supreme Court states in that footnote:

> "The Department's views as to the reach of the Twenty-first Amendment are supported by *National Railroad Passenger Corp. v. Miller* (D.Kan. 1973) 358 F.Supp. 1321, and by dictum in *Washington Brewers Institute v. United States* (9th Cir. 1943) 137 F.2d 964, decided a number of years before *Hostetter*. . . ."

What the California Supreme Court did not mention, however, was the fact that the *National Railroad Passenger Corp.* case was summarily affirmed by the United States Supreme Court in 1973 in 414 U.S. 948. In *National Railroad Passenger Corp v. Miller,* supra, the Court held

that Kansas statutes regulating the sale and distribution of liquor, passed under authority of the Twenty-first Amendment, could not be invalidated by Acts of Congress passed under authority of the Commerce Clause. A later federal case coming out of the 10th Circuit in 1974, recognized the effect of the summary affirmance by this Court of the earlier *National Railroad Passenger Corp.* case and reached the same result on the same basic facts. Amtrak was serving alcoholic beverages by the drink, contrary to Oklahoma law, on its passenger train passing through Oklahoma. This was the same situation as in Kansas in the earlier case. In disposing of the claimed exemption from the Oklahoma statute, the 10th Circuit Court ruled:

> ". . . Amtrak's first issue based on its claimed exemption from Oklahoma law was raised and decided adversely to it in *National Railroad Passenger Corporation v. Miller,* 358 F.Supp. 1321 (D.C.Kan., 1973), affirmed, 414 U.S. 948, 94 S.Ct. 285, 38 L.Ed.2d 205 (1973). It is therefore without merit." (*National Railroad Passenger Corporation v. Harris,* [10th Cir., 1974] 490 F.2d 572.)

The California Supreme Court has chosen to disregard the summary affirmance by the United States Supreme Court of the earlier *National Railroad Passenger Corp.* case. That case reaffirms this Court's position and is the most recent case of which petitioner is aware where this Court has, in effect, considered the Twenty-first Amendment issue involved in the instant case. Thus, the California Supreme Court's *Rice* decision and its adoption in the instant case presents a direct conflict with the decisions of the United States Supreme Court.

The effect to be given to a summary affirmance by the Supreme Court of the United States is well known and set forth clearly and concisely in the case of *Hicks v. Miranda* (1975) 422 U.S. 332, at page 344:

> ". . . votes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case . . ."

To further emphasize the significance of a summary affirmance, this Court, in *Hicks,* at page 344, cites the following quotation from C. Wright, *Law of Federal Courts,* 495 (2d Ed. 1970):

> "('Summary disposition of an appeal, however, either by affirmance or by dismissal for want of a substantial federal question, is a disposition on the merits.')."

And finally, as if to make the point abundantly clear to all, the Court states, at page 344:

> "That the lower courts are bound by summary decisions by this court 'until such time as the court informs [them] that [they] are not.'"

The California Supreme Court in similar disregard of the report of the Senate Judiciary Committee, which recommended repeal of the Miller-Tydings Act (fair trade contracts) and the McGuire Act (non-signer provisions), stated that the "report represents only an opinion that the Twenty-first Amendment will allow continuation of price fixing for liquor in those states that properly allow such conduct . . .".

Petitioner agrees with the Senate Judiciary Committee report's conclusion that neither the repeal of Miller-Tydings or McGuire is relevant to the question of the effect

of the Twenty-first Amendment on the power of a state to enact legislation relating to price maintenance.[5]

Probably the most significant statement in the first *National Railroad Passenger Corp.* case (*Miller*) in the present context is the following:

> "Under the Twenty-First Amendment, a state has the right to legislate concerning intoxicants brought from without the state for use and sale therein, unfettered by the Commerce Clause. *Ziffrin, Inc. v. Reeves,* 308 U.S. 132, 60 S.Ct. 163, 84 L.Ed. 128. A state is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants designed for use, distribution or consumption within its borders." (Citing both *Seagram & Sons* and *Hostetter.*) (At pg. 1327.)

The Court, in the earlier *National Railroad Passenger Corp.* case (*Miller*) points out, at page 1326, that the Webb-Kenyon Act, 27 U.S.C. § 122, first enacted in 1913, "took away the protection of interstate commerce from all receipt and possession of liquor prohibited by state law." In that connection, the Court cites *Clark Distilling Co. v. Western Maryland Railway Company,* 242 U.S. 311 at page 325. The Court further referred to the case of *McCormick & Co. v. Brown,* 286 U.S. 131 and stated:

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[5]The Senate Judiciary Report states: "Liquor will not be affected by repeal of the fair trade laws in the same manner as other products because the Twenty-First Amendment to the Constitution gives the States broad powers over the sale of alcoholic beverages. Thus while repeal of the fair trade laws generally will prohibit manufacturers from enforcing resale prices, alcohol manufacturers may do such in States which pass price fixing statutes pursuant to the Twenty-First Amendment." (1975 U.S. Code, Cong. & Admin. News, at pp. 1569, 1571.)

> ". . . the Court succinctly observed that there is no reason for denying to the Webb-Kenyon Act its intended application to prevent the immunity of transactions in interstate commerce from being used to impede the enforcement of the state's valid prohibitions."

Significantly, the Webb-Kenyon Act was not mentioned in the *Rice* case by the California Supreme Court. A consideration of the effect of Commerce Clause legislation by Congress on Twenty-first Amendment legislation by a state would seem incomplete without considering the Webb-Kenyon Act.

The *National Railroad Passenger Corp. v. Miller* opinion is well-considered, is a correct analysis of the current and past state of the law and adequately disposes of the central issue in this case, namely, the effect of the Twenty-first Amendment vis a vis the Commerce Clause in the field of alcoholic beverage regulation within the borders of a state. It properly interprets the leading cases and because of the effect of a summary affirmance by the United States Supreme Court should be dispositive of the issue in this case. Perhaps more importantly, the California Supreme Court's concession that its holding in *Rice* is contrary to the *National Railroad Passenger Corp. v. Miller* decision, demonstrates very forcibly the fact that both the decision in the instant case and in *Rice* are California decisions directly contrary to the decisions of the United States Supreme Court. For that reason alone, this petition should be granted.

II

THE STATE COURT DECISION IN DECLARING INVALID STATE REGULATORY STATUTES THAT REQUIRE THE SETTING OF MINIMUM PRICES FOR THE SALE OF WINE IS NOT IN ACCORD WITH DECISIONS OF THIS COURT DEFINING THE "STATE ACTION" EXEMPTION TO THE SHERMAN ANTITRUST ACT.

An additional reason for granting the writ in this case exists in the treatment by the California courts below, in both the instant case and in the *Rice* case of the "state action" exemption to the Sherman Antitrust Act. It is petitioner's contention that the consideration of whether or not to grant this writ can turn entirely on the incorrect application of United States Supreme Court cases to the Twenty-first Amendment power granted the states in the field of alcoholic beverage regulation. However, the *Rice* case treatment of the "state action" exemption and its adoption by the Court of Appeal in the instant case has created an intolerable situation of uncertainty and confusion in this area, and one which has implications in other fields of law as well, since the "state action" exemption is obviously broader than the alcoholic beverages field.

The rationale of the *Rice* case as to the "state action" exemption which was adopted by the Court of Appeal in the instant case is described by that Court in the following quotation from footnote 3 in the instant case:

> "In finding that the alcoholic beverage price maintenance scheme is not within the state action exception to the antitrust laws the California Supreme Court noted that the reason that exception does not apply

> is that price fixing in the liquor industry involves private conduct, the substance of which is totally unconfined by state regulation. " 'There is no control, or 'pointed re-examination,' by the state." " (21 Cal.3d at pp. 444-445.) This distinction was critical to the court's opinion in *Rice,* and the absence of state control over price maintenance relating to wine is fatal to those provisions as well as the distilled spirit provisions."

The statutes which the Court of Appeal has declared invalid in the instant case, and the statute which the *Rice* case declared invalid in that case are both found in the Alcoholic Beverage Control Act, a comprehensive and detailed series of statutes. (Section 23000 through 25762 of the Business & Professions Code of the State of California.) The *Rice* case statute (Section 24755) is found in chapter 10 of the Act entitled, "Alcoholic Beverages Fair Trade Contracts and Price Posting." The statutes involved in the instant case are found in chapter 11 entitled, "Wine Fair Trade Contracts and Price Posting." Chapter 12 is entitled "Beer Price Posting and Marketing Regulations."

Section 24749, the first section in chapter 10, declares as a matter of legislative policy:

> "It is the declared policy of the State that it is necessary to regulate and control the manufacture, sale, and distribution of alcoholic beverages within this State for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to the law. In order to eliminate price wars which unduly stimulate the sale and consumption of alcoholic beverages and disrupt the orderly sale and distribution thereof, it is hereby declared as the policy of this State that the sale of alcoholic beverages should be sub-

jected to certain restrictions and regulations. The necessity for the enactment of provisions of this chapter is, therefore, declared as a matter of legislative determination."

In connection with the authority granted by both Article XX, Section 22 of the California Constitution, and the Act, the Department has promulgated extensive regulations. Several of these rules deal with wholesale and retail prices of alcoholic beverages. (See, for example, Rules 90, 99, 99.2, 100, 101 and 105, Title 4 of the California Administrative Code.)

In section 23001, the California Legislature has set forth the purposes of the Act as follows:

"This division is an exercise of the police powers of the State for the protection of the safety, welfare, health, peace, and morals of the people of the State, to eliminate the evils of unlicensed and unlawful manufacture, selling, and disposing of alcoholic beverages, and to promote temperance in the use and consumption of alcoholic beverages. It is hereby declared that the subject matter of this division involves in the highest degree the economic, social, and moral well-being and the safety of the State and of all its people. All provisions of this division shall be liberally construed for the accomplishment of these purposes."

In order to sell wine at either wholesale or retail, the manufacturer or brand owner must either enter into a fair trade contract establishing minimum prices or an effective price schedule. (Sections 24862 and 24866.) Thus, the conduct by private entities is required by state statute. These provisions have been determined by legislative declaration

to be a necessary part of the Act in regulating the "use and consumption" of alcoholic beverages in California. As is demonstrated by the length, breadth and content of the Act itself, a "comprehensive regulatory system" which is "clearly articulated and affirmatively expressed as state policy" exists in California. It would likewise seem to require no argument to support the proposition that the state is acting in its sovereign capacity in adopting the statutes and enforcing them with state officials.

Notwithstanding the above, the California Supreme Court in *Rice* and the Court of Appeal in the instant case has ruled that under the "state action" exemption, as it interprets that doctrine from the cases of *Parker v. Brown* (1942) 317 U.S. 341, *Goldfarb v. Virginia State Bar* (1974) 421 U.S. 773, *Bates v. State Bar of Arizona* (1976) 433 U.S. 350, *Cantor v. Detroit Edison Co.* (1975) 428 U.S. 579 and *Lafayette v. Louisiana Power & Light Co.* (1977) 435 U.S. 389, this legislation by the State of California's Legislature, acting as sovereign, requiring the setting of prices by the manufacturers and brand owners, and with the Department not only enforcing the statutes, but additionally, adopting regulations requiring and compelling the conduct, somehow does not qualify for the "state action" exemption. Because of the broad implications of such a holding, not only in California but in the other states as well, and not only in the field of alcoholic beverages but in all fields where private conduct, required by state law, might be said to involve a "restraint of trade", and due to the weight given California Supreme Court decisions, throughout the judicial system, this aspect of the *Rice*

decision, adopted by the Court of Appeal in the instant case, requires review by this Court.

Although the *Parker* case was decided in 1942, it still appears to be the most significant case of this Court establishing the parameters for what constitutes "state action." Petitioner finds nothing in the language or holdings of *Goldfarb, Bates, Cantor* or *Lafayette* which detracts from or is contrary to the holding in *Parker,* especially as it applies to the instant case. There is a great similarity between the facts of both the instant case and the *Rice* case and the facts of the *Parker* case, as described hereinafter.

In *Parker,* the action sought to enjoin the enforcement of the state marketing plan by state officials—in the instant case the action is to restrain the enforcement of particular provisions of the Act by the Department; in *Parker,* the California Legislature had adopted a comprehensive marketing plan for raisins which included price setting—in the instant case the California Legislature adopted a comprehensive plan for regulating the sale of alcoholic beverages, including price setting; in the *Parker* case, state officials enforced the provisions of the marketing plan—in the instant case state officials enforce the price provisions of the Act. If the situation in *Parker* qualified as "state action", then it follows that the situation in the instant case constitutes "state action."

As is pointed out in the quotation from the Court of Appeal footnote above, in the instant case, the state itself does not set the price at which the articles are to be sold. The California Legislature has chosen to allow the various

manufacturers and brand owners to set the wholesale and retail prices of their own product. This results in numerous independent actions by the private sector in establishing prices as opposed to other methods of price regulation. For instance, the Legislature could have adopted a specified minimum markup such as the State of New York now has in connection with the sale of distilled spirits, (see section 101-bb of the New York Liquor Control Act) or the Legislature could have established a system wherein the state liquor administrator holds extensive and comprehensive hearings, much as a state public utilities commission does, to itself establish the prices at which the various alcoholic beverages are to be sold, as in the State of Kansas. (See section 41-1113 and 41-1114, Kansas Statutes.)

Nowhere in the reported cases does it appear that the applicability of the state action exemption depends on whether the prices are set by the manufacturer or brand owner, or by state statute or administrative hearings. Rather, the critical inquiry is directed to the question as to whether the conduct is required by state law. However, in this regard, an aspect of the *Parker* case that has been seemingly overlooked by the California Supreme Court in the *Rice* decision is the fact that as a practical matter the private growers in California, in *Parker,* did set the prices at which raisins were to be marketed. Additionally, the conduct, selling at "fixed" prices, was not "required" of the raisin growers since the growers in any particular district had to first initiate the request for the institution of a plan. Further, after a plan, including the price setting features, was adopted and reviewed by a state commission, it never-

theless had to be resubmitted to the growers for their final approval by referendum vote. Consequently, if the growers did not like the plan as approved or modified by the state, they could reject it and presumably start the process over again until a plan was approved by the state commission that was also "approved" by the growers. It can reasonably be said, therefore, that the conduct in the *Parker* case was not only initiated by the private sector without compulsion of law, but that the private sector, in effect, set the prices. Contrast this situation with that of the typical public utility commission situation, wherein the private utility submits a request for rate increase which may or may not be approved by the commission. The private utility does not have the option of rejecting or accepting the commission's action on its request as the raisin growers did in California in the *Parker* case.

This facet of the *Parker* case, overlooked by the California Supreme Court in *Rice,* is illustrated by the following quotation from page 352 of the *Parker* decision:

> ". . . Although the organization of a prorate zone *is proposed by producers,* and a prorate program, approved by the commission, *must also be approved by referendum of producers,* it is the state, acting through the commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy . . ." (Emphasis ours.)

Of the five most frequently cited cases involving the "state action" exemption, cited above, *Cantor* and *Goldfarb,* in denying the application of the exemption, have no application on their facts which would call for denial of the exemption to the instant case. In *Cantor,* where the utility

was furnishing free light globes as part of its rate structure to its customer there was no state-wide policy or statute that related to the furnishing of light globes, nor was the conduct of the utility in furnishing the free light globes compelled. The public utilities commission had merely approved the inclusion in the rate structure of the light globe give-away. In the instant case, the conduct is both required and part of a state-wide policy.

In *Goldfarb,* which involved the establishing of minimum fee schedules by bar associations for lawyers, there was no Virginia statute compelling or even approving such a practice, as this Court pointed out in the *Lafayette* case, at page 409, referring to *Goldfarb:*

> ". . . But no Virginia statute referred to lawyers' fees and the Supreme Court of Virginia had taken no action requiring the use of and adherence to minimum fee schedules. *Goldfarb* therefore held that it could not be said that the anticompetitive effects of minimum fee schedules were directed by the State acting as sovereign. Id., at 791. The State Bar, though acting within its broad powers, had 'voluntarily joined in what is essentially a private anticompetitive activity,' id., at 792, and was not executing the mandate of the State. . . ."

Cantor is significant to the instant case in its recognition that:

> "Unquestionably there are examples of economic regulation in which the very purpose of the government control is to avoid the consequences of unrestrained competition. Agricultural marketing programs, such as that involved in *Parker,* were of that character . . ." (Page 595.)

Bates upheld anticompetitive conduct as "state action", namely, the prohibition of advertising by lawyers in Arizona, since as was pointed out in the *Lafayette* case at page 410, in referring to *Bates:*

> "We emphasized, moreover, the significance to our conclusion of the fact that the state policy requiring the anticompetitive restraint as part of a comprehensive regulatory system, was one clearly articulated and affirmatively expressed as state policy, and that the State's policy was actively supervised by the State Supreme Court as the policymaker."

In the instant case, we have a "comprehensive regulatory system", which is "clearly articulated and affirmatively expressed" and the "state's policy was actively supervised" by the Department both by way of adopting administrative regulations and the active enforcement of both the regulations and the Act as demonstrated by the *Rice* case and the instant case.

In rejecting the "state action" exemption in the *Rice* case, the California Supreme Court ignored what appears to be the basic question in the *Lafayette* case, namely, whether or not the conduct complained of, i.e., the "tying" arrangement, was compelled or required by the state. The only reference to the *Lafayette* case in the *Rice* decision is contained in a reference in a footnote (fn. 7, p. 443) in which the Court simply notes that "the United States Supreme Court distinguished *Cantor* on the ground that it involved anticompetitive activities of private parties." While it is true that this Court apparently placed the City of Lafayette in its role as a public utility somewhere between a "state" and a "private party," nevertheless, the

reasonable interpretation of this Court's ruling in *Lafayette* is that the conduct complained of was a restraint of trade which the City of Lafayette could not engage in unless it was required by state law. It thus appears that *Lafayette* supports the application of the "state action" exemption in the instant case.

In any event, petitioner urges that the California Supreme Court decision in *Rice,* and the decision of the Court of Appeal in the instant case in declaring that the state statutes involved are not saved by the "state action" exemption to the Sherman Antitrust Act are in conflict with the decisions of this Court setting forth the parameters of the "state action" exemption.

III

THE STATE COURT DECISIONS HAVE CREATED CONFUSION AND UNCERTAINTY AS TO THE VALIDITY OF ANY STATE ALCOHOLIC BEVERAGE STATUTE WHERE IT CAN BE ARGUED THAT COMPLIANCE WITH THE STATUTE CONSTITUTES A "RESTRAINT OF TRADE."

(A) The Caifornia Situation.

The *Rice* case decision declared price maintenance provisions at the consumer level relating to distilled spirits to be invalid under the Sherman Antitrust Act. In the *Capiscean* case a California Court of Appeal extended the *Rice* rule to include consumer price maintenance for wine. In the instant *Midcal* case, the Court of Appeal further extended the *Rice* case to include not only a declaration of invalidity of consumer price maintenance for wine, but also a declaration of invalidity of the price posting of the

wholesaler to retailer prices for wine. In the application for a writ in the *Farmer's Market, Inc.* case, (referred to supra under Statement of the Case) filed in the same Court of Appeal that decided the instant case, it is alleged that beer and distilled spirits price posting provisions wholesale to retail are likewise invalid under the *Rice* case and the *Midcal* case. The Alcoholic Beverage Control Appeals Board, in reviewing a decision of the Department, although recognizing its inability to declare a statute invalid as contrary to federal law, has nevertheless clearly indicated that it would otherwise hold that the beer price posting wholesale to retail statute (Section 25000) is invalid under the *Rice* case, and the requirement in the California Act that a beer manufacturer designate a beer distributor (Section 25000.5) for an exclusive territory to distribute beer is likewise invalid as a restraint of trade under the rationale of the *Rice* case. That case is presently pending in the First District Court of Appeal, Division 3, in California being 1 Civil No. 47118, *Anthony C. Ferrigno dba Consumers Distributing v. Alcoholic Beverage Control Appeals Board; Department of Alcoholic Beverage Control, Real Party in Interest.*

The effect of the *Rice* case and the instant *Midcal* case has been to put the alcoholic beverage regulation in California into a state of great confusion and uncertainty, not to mention the disastrous effect that it has had on retailers and will have on all segments of the industry and regulation if the uncertainty and confusion is allowed to continue.

Under the present state of uncertainty and confusion a lawyer would be remiss if in any disciplinary action against an alcoholic beverage licensee in California he failed to

raise the question about whether or not the particular statute that his client is being charged with violating is in any way a "restraint of trade." It would be the lawyer's duty to the client to raise the antitrust question under the *Rice* and *Midcal* cases. Likewise, it would appear that any licensee that felt that somehow he was caught between statutory requirements that he comply with California law on the one hand, or disobey California law on the other hand on the basis that compliance could constitute a violation of the Sherman Antitrust Act, would be compelled to seek judicial relief by way of declaratory relief in a Court of Appeal in California.

The situation in California will continue to spawn more needless litigation and should therefore be quickly resolved. The *Rice* and *Midcal* decisions have also created uncertainty as to the validity of any legislation that might be passed by the California Legislature to attempt to cure the problems created by the California judicial decisions.

(B) Effect on New York and Other States.

The State of New York also has a comprehensive scheme of regulation in the field of alcoholic beverages which includes such aspects as minimum markup at retail, price affirmation, and wine fair trade contracts to mention several that are related to the California Court decisions.

As mentioned earlier, the price affirmation statute in New York, and presumably its wholesale to retail price posting requirement was upheld in the *Seagrams* case in 1966 by this Court. However, if the analysis in *Rice* of the effect of the Twenty-first Amendment is correct then a serious question arises as to the current validity of the

Seagrams case, and concurrently the validity of the New York law involved in *Seagrams.*

The wine fair trade contract provisions of New York law are the subject of litigation in at least one case in New York at the present time. *In the Matter of William J. Mezzetti Associates, Inc. v. State Liquor Authority* (1978) 410 N.Y.S.2d 893, is presently pending before the Court of Appeal of New York with a motion for leave to appeal having been granted, but with the appeal taken as of right dismissed without costs as indicated by the excerpt from the New York Law Journal (Exhibit "I"). In the *Mezzetti* case, in the Appellate Division of the Supreme Court in New York, the Court upheld the validity of the New York wine fair trade statute against the allegations that it violated the Sherman Antitrust Act. That Court stated, in its short memorandum opinion:

> "Section 101-bbb of the Alcoholic Beverage Control Law falls well within the intended scope of the Twenty-first Amendment to the United States Constitution and constitutes State action which does not conflict with the Sherman Antitrust Act (see *Matter of Theodore Polon, Inc. v. State Liq. Auth.*, 59 A.D.2d 946, 399 N.Y.S.2d 469). We have considered petitioner's other contentions and find them to be without merit."

However, in a concurring opinion, Justice Suozzi expressed a preference for the holding of the *Rice* case, stating:

> "I concur in the result reached by the majority solely on constraint of *Polon.* However, it is my view that section 101-bbb of the Alcoholic Beverage Control Law is violative of the Sherman Antitrust Act

> and, in that regard, I agree with the well-reasoned opinion of the Supreme Court of California in *Rice v. Alcoholic Beverage Control Appeals Bd.,* 21 Cal.3d 431, 146 Cal.Rptr. 585, 579 P.2d 476, which struck down a statute virtually identical to the one at bar as violative of the Sherman Antitrust Act."

As indicated by the concurring opinion by the Appellate Division Justice in *Mezzetti,* the decision of California's Supreme Court is given wide circulation and traditionally and typically the California Supreme Court has been looked to by the courts of other states of the Union as being a leader in judicial performance and in the logic and reasoning involved in a typical opinion from that Court. The reputation of the California Court thus will lead to more uncertainty and confusion in other states than might otherwise be the case from some other courts.

As described earlier, there are some fourteen other states that have similar wholesale to retail price posting for alcoholic beverages. (See Appendix F.) The present status of the California cases, including both the instant case and the *Rice* case, of necessity has created great uncertainty and confusion about the validity of those statutes in these other states. Additionally, legislation that may be proposed in other states is subject to the same uncertainty and confusion as a result of the California decisions, as was described in the California section above.

(C) Threat of Civil and Criminal Prosecution Under the Sherman Antitrust Act.

In the instant case, the *Midcal* court indicates one of the serious problems created by the present situation with

regard to the validity of all of the sections of the Act, or of the statutes of any other state which may be now argued to be "restraint of trade" under *Rice* or *Midcal*.

At page 982, of the Court of Appeal decision, the situation is described thusly:

> ". . . [P]etitioner is placed in the untenable position of having to choose to obey possibly conflicting federal and state laws and face a penalty under the one it chooses to disobey . . ."

California licensees at all levels of the industry are now in the unenviable position of being uncertain as to whether or not to comply with various provisions of the Alcoholic Beverage Control Act and thus face potential civil or criminal Sherman Act litigation if it is alleged the conduct thus required by state law is in "restraint of trade."

This most unsatisfactory situation with its widespread repercussions throughout the entire alcoholic beverage industry was created by the California Courts' decisions in the *Rice* and *Midcal* cases and must be finally resolved in order to eliminate the intolerable situation thus created.

It is therefore imperative that this Court, the only Court that can resolve the issue once and for all, grant this writ and rule definitively on the precise questions presented in this case, namely, whether or not the California wholesale to retail price posting requirements for wine and the California retail to consumer price maintenance provisions for wine are proper and valid legislation under the Twenty-first Amendment, notwithstanding the Sherman Antitrust Act, and whether or not action required by state statute as part of a comprehensive regulatory scheme in

the field of alcoholic beverages is conduct that is exempt from the Sherman Antitrust Act under the "state action" exemption.

CONCLUSION

For all of the foregoing reasons, this Court should grant certiorari.

Dated: July 12, 1979.

Respectfully submitted,

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(Appendices Follow)

Appendices

Appendix A

In the Court of Appeal
of the
State of California

Third Appellate District

3 Civil No. 17992

Midcal Aluminum, Inc.,
Petitioner,

vs.

Baxter Rice, as Director, etc.,
Repondent;

California Retail Liquor Dealers Association,
Intervener.

[Filed Mar. 26, 1979]

OPINION

Reynoso, J.—The recent Supreme Court opinion in *Rice* v. *Alcoholic Bev. etc. Appeals Bd.* (1978) 21 Cal.3d 431 [146 Cal.Rptr. 585, 579 P.2d 476], which invalidated California's price maintenance laws relating to retail sales of distilled spirits, gives rise to this litigation. By writ of mandate Midcal Aluminum, Inc., seeks a determination as to the validity of the fair trade and price posting laws regulating the sale, both wholesale and retail, of wine in this state. We hold, as a logical axle of the *Rice* wheel, that the fair trade and price posting laws relating to wine are invalid—at the wholesale and retail level.

1. *The Background*

An accusation was filed against petitioner before the Department of Alcoholic Beverage Control charging that on or about July 21, 1978, it sold or caused to be sold to a licensed retailer 27 cases of wine at prices less than the selling prices contained in the effective price schedule filed with the department by the E & J Gallo Winery. The second count charged that petitioner had sold or had caused to be sold to certain retailers wine for which there was no effective fair trade contract duly filed with the depart ment. The petitioner stipulated to the truthfulness of the facts set forth in the accusation.

Petitioner entered into a further stipulation that "[T]he Department may, subject to a judicial determination of the constitutionality of Section 24850 et seq., Business and Professions Code and Rule 101 of Chapter 1, Title 4, California Administrative Code, impose a monetary penalty or suspension of [petitioner's] licenses as provided in Section 24880 of the Business and Professions Code."[1] Petitioner proceeded to file its petition for writ of mandate in this court.[2]

2. *Mandate Proceedings*

(1) Mandate is an appropriate writ for the review of the exercise of quasi-judicial power by a constitutionally

[1]All statutory references are to the Business and Professions Code.

[2]The California Retail Liquor Dealers Association sought, and was granted, leave to file a complaint in intervention opposing the petition for a writ of mandate. This court subsequently issued an alternative writ of mandate and stayed further action on the accusation against petitioner. We stayed further action in enforcing the price posting provisions of the Alcoholic Beverage Control Act as to any licensee insofar as that act required the posting of minimum retail prices at which wines may be sold to the public.

authorized statewide agency such as the Department of Alcoholic Beverage Control. (*Sail'er Inn, Inc.* v. *Kirby* (1971) 5 Cal.3d 1, 7 [95 Cal.Rptr. 329, 485 P.2d 529, 46 A.L.R.3d 351].) The writ is particularly appropriate in light of the following. First, petitioner attacks the validity of the fair trade and price posting laws on their face; no material facts are in dispute. Second, important issues of statewide significance are raised. Third, petitioner is placed in the untenable position of having to choose to obey possibly conflicting federal and state laws and face a penalty under the one it chooses to disobey. Under such circumstances it would be improper to require petitioner to exhaust its administrative remedies. (*Sail'er Inn Inc.* v. *Kirby, supra,* 5 Cal.3d at pp. 6-7.)

We do not share respondent's fear that our assuming jurisdiction in this case will herald the inundation of similar petitions, attempting to bypass the Alcoholic Beverage Control Appeals Board for review of mere disciplinary orders through feigned constitutional issues. Petitioner has conceded the factual basis for the accusation and questions only the validity of the law. We do not review the accusation; we consider only the validity of the fair trade and price posting laws. It is doubtful that licensees in like position will feign constitutional issues; it is understood that if those issues are rejected the licensee will be left before the Department to face accusations which it has admitted.

3. *The Rice Rationale*

In *Rice* v. *Alcoholic Bev. etc. Appeals Bd., supra,* 21 Cal. 3d 431, the California Supreme Court held that the fair

trade laws relating to the retail sale of distilled spirits violate the Sherman Anti-Trust Act (15 U.S.C. § 1 et seq.).[3] Their invalidity necessarily followed. In reaching its decision the court considered whether the fair trade laws are within the "state action" exception to the Sherman Anti-trust Act and whether the Twenty-first Amendment to the United States Constitution allowed the state to enact such laws. Neither the state action exception nor the Twenty-first Amendment was found to provide a basis for upholding the fair trade laws relating to retail sale of distilled spirits.

(2) The statutes and regulations relating to price maintenance of wine challenged in this proceeding bear no significant differences to the statutes and regulations relating to price maintenance of distilled spirits found to be

[3]The intervener suggests that a recent United States Supreme Court decision, *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.* (1978)—U.S.—[58 L.Ed.2d 361, 99 S.Ct.—], casts doubt upon the reasoning of the California Supreme Court in *Rice*. Applicable statutes require an automobile manufacturer to obtain approval of the California New Motor Vehicle Board before opening or relocating a retail dealership within the market area of an existing franchise if the latter protests. Upon receiving a protest from an existing dealer the manufacturer is not allowed to establish or relocate the proposed dealership until the Board holds a hearing and determines that there is not good cause for refusing to permit the establishment of the dealership. The United States Supreme Court held that the law is within the state action exception to the Sherman Anti-Trust Act. The court noted that a dealer protest serves only to trigger board action, the state does not attempt to authorize or immunize private conduct violative of the antitrust laws.

In finding that the alcoholic beverage price maintenance scheme is not within the state action exception to the antitrust laws the California Supreme Court noted that the reason that exception does not apply is that price fixing in the liquor industry involves private conduct, the substance of which is totally unconfined by state regulation. "There is no control, or 'pointed re-examination,' by the state." (21 Cal.3d at pp. 444-445.) This distinction was critical to the court's opinion in *Rice*, and the absence of state control over price maintenance relating to wine is fatal to those provisions as well as the distilled spirit provisions.

invalid in *Rice* v. *Alcoholic Bev. etc. Appeals Bd., supra,* 21 Cal.3d 431. Under Business and Professions Code section 24862 no licensee may sell or resell to a retailer, and no retailer may buy any item of wine except at the selling or resale price contained in an effective price schedule or in an effective fair trade contract. No licensee is permitted to sell or resell to any consumer any item of wine at less than the selling or resale price contained in an effective price schedule or fair trade contract. Under section 24866 each grower, wholesaler, wine rectifier or rectifier must make and file fair trade contracts and/or file schedules of the resale prices of wines. These sections result in price-fixing in wine identical to that found to be repugnant to the Sherman Anti-Trust Act when applied to distilled spirits. (See *Rice* v. *Alcoholic Bev. etc. Appeals Bd., supra,* 21 Cal.3d at pp. 445-446; see also, *Capiscean Corporation* v. *Alcoholic Bev. etc. Appeals Bd.* (1979) 87 Cal.App.3d 996 [151 Cal.Rptr. 492], holding the price maintenance provisions relating to the retail price of wine to be invalid under *Rice*.) Our consideration is controlled by the reasoning of the Supreme Court in *Rice*. Unless there appears an independent basis for upholding the fair trade laws relating to wine we must declare those laws to be invalid.

We do not find the provisions of the fair trade laws relative to wholesale price maintenance different from those relative to retail price maintenance. Price fixing, whether at the wholesale or retail level, is violative of the Sherman Anti-Trust Act. (See *United States* v. *Topco Associates* (1971) 405 U.S. 596, 611-612 [31 L.Ed.2d 515, 527-528, 92 S.Ct. 1126]; *Kiefer-Stewart* v. *Seagram & Sons* (340 U.S. 211, 213-214 [95 L.Ed. 219, 223-224, 71 S.Ct. 259]; *United*

States v. *Bausch & Lomb Co.* (1943) 321 U.S. 707, 720 [88 L.Ed. 1024, 1033, 64 S.Ct. 805]; *Dr. Miles Med. Co.* v. *John D. Park & Sons Co.* (1910) 220 U.S. 373 [55 L.Ed. 502, 31 S.Ct. 376].) The wholesale price maintenance provisions relating to wine cannot be upheld for the same reasons the retail price maintenance provisions were declared invalid in *Rice.*

The intervener suggests that the distinction between wine and distilled spirits renders *Rice* inapplicable. We cannot agree. All of the considerations involved in *Rice* apply to wine as well as to distilled spirits. Thus, the court in *Rice* noted that the price maintenance provisions have resulted in the elimination of any semblence of competition within the industry and that the consumer pays about the highest retail prices for liquor, beer and wine in the country, although the state levies one of the lowest excise taxes on these beverages. (21 Cal.3d at p. 455. See 1 Sen. Select Com. Rep. on Laws Relating to Alcoholic Beverages (1974) pp. 9 and 82-83.)

The purpose of the price maintenance provisions, to promote temperance and orderly marketing conditions, can be achieved by other means in regard to wine as well as distilled spirits. (See 21 Cal.3d at pp. 456-457.) The declared purposes of the fair trade laws relating to alcoholic beverages do not indicate that the protection of the California wine industry was a legislative consideration, nor do we find anything in the act so to suggest. (See Bus. & Prof. Code, § 24749.) That the provisions do not distinguish between California wines and imported wines indicates that protection of the California wine industry was not the pur-

pose of the enactment of the provisions, as does the fact that the provisions are identical in result and operation to the distilled spirit price maintenance provisions. We conclude that the wine price maintenance provisions of the Business and Professions Code violate the Sherman Anti-Trust Act. See *Capiscean Corporation* v. *Alcoholic Bev. etc. Appeals Bd., supra,* 87 Cal.App.3d 996.)[4]

5. *Nonseverability*

Respondent argues that the wholesale price posting requirements are valid and should be severed from the invalid portions of the statutes. We have noted that we find wholesale price fixing to be invalid. Intervener suggests that portions of sections 24862 and 24866 merely require each distributor to post a schedule of prices at which he will sell to retailers. The exchange of price information is not a violation of the antitrust laws when the exchange does not amount to price fixing. (*Treasure Val.*

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[4]The intervenor urges that the price maintenance provisions relating to wine are within the "state action" exception to the Sherman Anti-Trust Act and that the Twenty-first Amendment to the United States Constitution grants to the state the power to pass such laws over liquor. Essentially, intervenor asks us to reconsider our Supreme Court's decision in *Rice.* We may do so, it is urged, because that court relied exclusively on federal law in declaring the price maintenance provisions relating to retail distilled spirits sales invalid, and, in intervener's view, the court erred in interpreting federal law. We disagree with intervener's view that the decisions of the California Supreme Court are open to reconsideration by a California Court of Appeal. As an appellate court we are bound by the decisions of the California Supreme Court. (See *Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, 455 [20 Cal.Rptr. 321, 369 P.2d 937].) The California Supreme Court carefully considered whether the California liquor price maintenance scheme was within the state action exception or saved by the Twenty-first Amendment, and concluded that neither exception applied. (*Rice, supra,* 21 Cal.3d at pp. 441-444, 447-457.) We are bound by that decision.

Potato Bar. Ass'n. v. *Ore-Ida Foods, Inc.* (9th Cir. 1974) 497 F.2d 203, cert. den. 419 U.S. 999 [42 L.Ed.2d 273, 95 S.Ct. 314]; *Gray* v. *Shell Oil Co.* (9th Cir. 1972) 469 F.2d 742, cert. den. 412 U.S. 943 [37 L.Ed.2d 403, 93 S.Ct. 2773].) Further, it is argued, a requirement that wine distributors file with the department a list of their selling prices to retailers is not invalid.

Respondent and intervener misread Business and Professions Code section 24866. That section requires: (1) each wine grower, wholesaler licensed to sell wine, and wine recitifier to post a schedule of selling prices of wine to retailers or consumers for which the resale price is not governed by a fair trade contract made by the person who owns or controls the brand, and (2) each of those entities to make and file a fair trade contract and a schedule of resale prices if a brand of wine is owned or controlled by them. Section 24862 provides that no licensee shall sell to a retailer, and no retailer shall buy any item of wine except at the selling or resale price contained in an effective price schedule or in an effective fair trade contract. A price schedule filed under section 24866 must contain the same information that a fair trade contract is required to contain, including selling and resale prices to retailers and consumers. (Bus. & Prof. Code § 24869.)

The legislative scheme is not one which merely requires each distributor to specify prices. The scheme, as we explain, is for the purpose of fixing prices. No distributor is required to post such a schedule where a fair trade contract governs the price. Thus, the price posting requirements are intended to reach the same result as a fair trade

contract. That identical information is required in a price schedule as in a fair trade contract supports our conclusion. The provisions of the Business and Professions Code relating to distilled spirits require a "schedule" of prices to be filed which fixes the prices (§ 24755), while a "price list" required to be filed by each distributor merely contains the prices. (§ 24756) There is no requirement that each wine distributor file a "price list"; the requirement is only that distributors file a "price schedule" where a fair trade contract does not govern. The use of the word "schedule" rather than "list" indicates that price fixing is the intended result of the price posting requirements. We note that the department has interpreted the price schedule filed by one distributor to bind other distributors of the same brand of wine. The regulations of the department provide that only one distributor may file a price schedule for any brand of wine in a trading area. (Cal. Admin. Code, tit. 4, § 101 subd. (g).) Consequently, one of the charges against petitioner is that it sold wine for less than the price contained in a price schedule filed by E & J Gallo Winery.

As we interpret sections 24862 and 24866, the schedule of selling prices which must be filed where no fair trade contract governs binds other distributors to sell at the "scheduled" prices. The difference between fair trade contract control of prices and the price posting system is one of form rather than substance. (See *Rice* v. *Alcoholic Bev. etc. Appeals Bd.*, *supra*, 21 Cal.3d at p. 438.) We conclude that the price posting provisions result in price fixing and are invalid for that reason.

Let a peremptory writ of mandate issue ordering respondent to refrain from enforcing the fair trade and wine price posting provisions of the Alcoholic Beverage Control Act.[5]

Puglia, P. J., and Evans, J., concurred.

[5]More particularly, the following shall not be enforced: section 24850 et seq., and more particularly, sections 24862 and 24866 of the Business and Professions Code, and the regulations promulgated pursuant thereto, and more particularly section 101, chapter 1, title 4, California Administrative Code.

Appendix B

Clerk's Office, Supreme Court
4250 State Building

San Francisco, California 94102

May 24, 1979

I have this day filed Order

HEARING DENIED

In re: 3 Civ. No. 17992

Midcal Aluminum, Inc.

vs.

Rice

Respectfully,

G. E. Bishel
Clerk

Appendix C

In the Supreme Court
of the
State of California

Baxter Rice, as Director, etc., Petitioner, vs. Alcoholic Beverage Control Appeals Board, Respondent; Christine T. Corsetti et al., Real Parties in Interest.	S.F. No. 23631
Young's Market Company et al., Petitioners, vs. Alcoholic Beverage Control Appeals Board, Respondent; Christine T. Corsetti et al., Real Parties in Interest.	S.F. No. 23632

[Filed May 30, 1978]

OPINION

Mosk, J.—Section 24755 of the Business and Professions Code requires that a manufacturer or brand owner file with the Department of Alcoholic Beverage Control (department) a minimum price schedule for distilled spirits which bear the brand name of the owner (subds. (a), (c)),

and it prohibits an off-sale retail licensee from selling at less than that prescribed price (subd. (f)).[1] In this proceeding, we are called upon to decide whether this provision and the regulations of the department implementing

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[1]All references will be to the Business and Professions Code unless otherwise noted.

Section 24755 provides in part: "(a) No package of distilled spirits which bears the brand, trademark or name of the owner or person in control shall be sold at retail in this state for consumption off the license premises unless a minimum retail price for such package first shall have been filed with the department in accordance with the provisions of this section.

"(b) A price for each of such packages shall be in a minimum retail price schedule setting forth with respect to each package the exact brand, trademark or name, capacity, and type of package, type of distilled spirits, age and proof, where stated on the label, and the minimum selling price at retail. The price for any such package may be filed separately and differently for the trading area of southern California and the trading area of northern California. The trading area of southern California shall consist of the Counties of Santa Barbara, Ventura, Los Angeles, Orange, Riverside, San Bernardino, Imperial and San Diego. The northern California trading area shall consist of the other counties of the state. No more than one person shall file a schedule for the same package for the same trading area.

"(c) Such schedule shall be filed by (1) the owner of the brand, if licensed in the state; (2) any licensee, other than a retailer, selling the brand and who is authorized in writing by the brand owner to file such schedule if the brand owner is not licensed in this state; (3) a manufacturer or rectifier licensed in this state and who bottles under the brand owned by a retailer; or (4) any licensee with the approval of the department, if the owner of the brand does not file or is unable to file a schedule or authorize a licensee other than a retailer to file such schedule.

"(d) Schedules filed pursuant to this section may be amended, changed, or modified by filing such amendments, change, or modification with the department on or before the 15th day of any month to take effect on the first day of the second succeeding calendar month; except that prices filed for a brand, size, or type not included in a schedule in effect at the time such brand, size, or type is filed, and prices filed to meet the price of a competitive brand, may be filed on or before the 15th day of any month to take effect on the first day of the following month. For the purpose of this section, a competitive brand shall mean any brand of the same type of distilled spirits having a filed selling price at retail within one dollar ($1) per gallon of the brand for which a competitive price is filed.

"The department shall reject any price schedule which does not comply with this subdivision.

"(e) A price schedule or amendment, change or modification thereof as provided for by this section shall be deemed filed when received, either by personal delivery or mail, at the headquarters office of the department in Sacramento. Upon such filing, a price schedule or amendment, change or modification thereof shall become a public record. Such filing of a price schedule or amendment, change or modification thereof shall constitute constructive notice of its contents to any licensee affected thereby.

"(f) No off-sale licensee shall sell any package of distilled spirits at any price less than the effective filed price of such package unless written permission is granted by the department, for good cause shown and for reasons not inconsistent with this division."

[2]For convenience, we shall refer only to section 24755 in our discussion. Obviously, our conclusion regarding the validity of the provision will also apply to the department's rule implementing the section.

it (Cal. Admin. Code, tit. 4, § 99, subd. (a)) conflict with the Sherman Antitrust Act (15 U.S.C. § 1 et seq.), which declares combinations in restraint of trade illegal.[2]

On November 25, 1975, real parties in interest, Christine and Richard Corsetti (Corsetti), doing business as Bob's Market, sold a bottle of Christian Brothers brandy to an employee of the department for $1.80 less than the posted price, and one of Courvoisier cognac for $1.75 less than the posted price. On December 4, they sold two bottles of Johnny Walker scotch whiskey and two bottles of Christian Brothers brandy for $2.30 and $2.58 less than the posted price, respectively. After a hearing, the department suspended Corsetti's license for 10 days. On appeal to the Alcoholic Beverage Control Appeals Board (the board), Corsetti sought to have the order of the department annulled, claiming that section 24755 is invalid as a violation of the Sherman Antitrust Act (Sherman Act), and that it violates equal protection of the laws. The board agreed with these

contentions and reversed the decision of the department.[3] (1) (See fn.4.) The department seeks to annul the board's order.[4]

The two issues we must consider in deciding the constitutionality of section 24755 are whether the section violates the Sherman Act, and if so, whether the Twenty-first Amendment to the United States Constitution nevertheless affords the states sufficiently broad powers over the sale and distribution of alcohol that fair trade laws pertaining to alcohol are valid despite the conflict.

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[3]Corsetti also asserted before the board that the evidence was insufficient to support the findings that he had violated section 24755, and that the penalty was improper. The board upheld the department's findings in these respects, and Corsetti does not challenge these aspects of the board's decisions.

[4]Young's Market Company and other wholesale distributors of alcoholic beverages (Young's) also sought review. However, their petition must be denied because they were not parties to the proceedings before the board.

Under article XX, section 22, of the California Constitution, orders of the board are subject to judicial review "upon petition of . . . any party aggrieved by such order." Section 23090 allows "any person" affected by a final order of the board to apply for a writ of review. However, section 23090.3 states that the "board . . . and each party to the action or proceeding before the board shall have the right to appear in the review proceeding," and under section 23090.4, a copy of the pleadings must be served "on each party" who appeared before the board.

We hold that these provisions read as a whole, limit the right of review of the board's decision to parties who appeared before the board. This limitation is consistent with the rule followed by appellate courts in reviewing the actions of trial courts. In such cases a person who is not a party of record to the proceeding below has no standing to appeal. (*Eggert* v. *Pac. States S. & L. Co.* (1942) 20 Cal.2d 199 [124 P.2d 815]; *City of Downey* v. *Johnson* (1968) 263 Cal.App.2d 775, 782 [69 Cal.Rptr. 830]; *People* v. *United Bonding Ins. Co.* (1969) 272 Cal.App.2d 441, 442 [77 Cal.Rptr. 310].) Young's Market did not appear below and therefore has no right to seek review here.

Section 2 of the Twenty-first Amendment provides, "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." The Sherman Act, which derives its authority from the commerce clause (U.S. Const., art. I, § 8, subd. (3)) would, of course, prevail over state fair trade laws under the supremacy clause (U.S. Const., art. VI, § 2), unless the special powers granted to the states over alcohol by the Twenty-first Amendment allow the states to enact such laws.

I

Before reaching the merits of the issues before us, it is helpful to review the history of the federal and state statutes upon which our decision turns.

As originally enacted in 1890, section 1 of the Sherman Act contained a single simple sentence: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." (26 Stat. 209.) In 1937 Congress passed the Miller-Tydings Act as an amendment to section 1. The amendment excepted from the provisions of the section "contracts . . . prescribing minimum prices for the resale" of certain commodities in intrastate commerce, if such contracts were lawful under state law. (50 Stat. 693.)

Some states, including California (Stats. 1933, ch. 260, p. 793) and Louisiana (La.Gen.Stats. § 9809.1 et seq.) had enacted so-called non-signer provisions. These statutes authorized the imposition of a minimum price upon a retailer

who had not entered into a contract with a wholesaler or distributor specifying such a price, if the wholesaler or distributor had concluded a contract for a minimum price with any retailer, i.e., all retailers were bound by a minimum price agreed to by any retailer. In *Schwegmann Bros.* v. *Calvert Corp.* (1951) 341 U.S. 384 [95 L.Ed. 1035, 71 S.Ct. 745, 19 A.L.R.2d 1119], the United States Supreme Court held a nonsigner provision in the Louisiana law invalid under the Sherman Act on the ground that the Miller-Tydings exception authorized states to allow the fixing of minimum prices only if a retailer consented by contract with a wholesaler to abide by such prices, whereas the Louisiana statute coerced retailers to abide by a price to which they had not agreed.

In the year following the *Schwegmann* decision, Congress responded by passing the McGuire Act (66 Stat. 632), which declared that nonsigner provisions were not unlawful under the Sherman Act.

California initially allowed resale price maintenance only by contract between a retailer and wholesaler (Stats. 1931, ch. 278, p. 583) but, as we have seen, in 1933 a nonsigner provision was enacted.[5] It was not until 1961 that section 24755 was amended to allow control of the price of liquor by means of the filing with the department of a minimum retail price which all retailers are required to observe. The change from the nonsigner mode of controlling retail prices to the present price-posting system is one of form rather than substance. (*Samson Market Co.* v. *Alcoholic*

[5]Section 24750 still allows fair trade contracts for the resale of alcoholic beverages, and section 24752 prohibits retail sales below that price, whether or not a party has signed the contract.

Bev. etc. Appeals Bd. (1969) 71 Cal.2d 1215, 1220 [81 Cal. Rptr. 251, 459 P.2d 667].)

The board's determination that section 24755 violates the Sherman Act was based upon the repeal by Congress of the Miller-Tydings Act and the McGuire Act by the Consumer Goods Pricing Act of 1975 (89 Stat. 801), the public interest in free competition, and the "changed circumstances in law and fact" since this court upheld the validity of the retail price maintenance laws in *Allied Properties* v. *Dept. of Alcoholic Beverage Control* (1959) 53 Cal.2d 141 [346 P.2d 737] and *Wilke & Holzheiser, Inc.* v. *Dept. of Alcoholic Bev. Control* (1966) 65 Cal.2d 349 [55 Cal.Rptr. 23, 420 P.2d 735].

The board reasoned as follows: The repeal of the Miller-Tydings Act and McGuire Act exemptions to the Sherman Act, as well as the repeal of California fair trade laws relating to products other than liquor (Stats. 1975, ch. 402, p. 878), reflects a growing apprehension that fair trade laws are not in the public interest. Price fixing for whatever purpose requires close scrutiny, and a number of recent studies have cast doubt upon the underlying justification for fair trade laws. These studies reveal that the absence of fair trade laws does not harm small business and has no significant effect upon the consumption of alcohol or temperance. The California consumer pays more than the residents of any other state for alcoholic beverages because of the fair trade laws; liquor distributors reap the benefit of these high prices. Price fixing among producers has "resulted in the elimination of any semblance of competition within the industry." In view of these factors, which demon-

strate that there has been a change in circumstances since *Allied Properties* and *Wilke & Holzheiser, Inc.* were decided (citing *Brown* v. *Merlo* (1973) 8 Cal.3d 855 [106 Cal.Rptr. 388, 506 P.2d 212, 66 A.L.R.3d 505]; *Li* v. *Yellow Cab Co.* (1975) 13 Cal.3d 804 [119 Cal.Rptr. 858, 532 P.2d 1226, 78 A.L.R.3d 393]), the retail price maintenance provision set forth in section 24755 is no longer justified.[6]

The board also determined that the Twenty-first Amendment does not "negate the commerce clause" and that under our decision in *Sail'er Inn, Inc.* v. *Kirby* (1971) 5 Cal.3d 1, 11 [95 Cal.Rptr. 329, 485 P.2d 529, 46 A.L.R.3d 351], the objectives of the Sherman Act and the Twenty-first Amendment must be weighed against one another in order to determine which shall prevail. It concluded that, in view of the matters referred to above, the Sherman Act should govern, and that, since section 24755 is in conflict with the Sherman Act, it is invalid.

II

(2) Our first inquiry is whether retail price maintenance provisions of section 24755 violate the Sherman Act in its present form, i.e., without the exemptions previously afforded by the Miller-Tydings Act and the McGuire Act.

We begin with the proposition that if the conduct of the liquor producers in fixing minimum retail prices did not have governmental sanction or if the imposition of minimum prices upon retailers was not required by the state, but

[6]The studies upon which the board based its determination will be discussed *infra*. The board based its conclusion that section 24755 violates equal protection of the laws upon these same "changed circumstances."

was discretionary with the producer, there would be a clear violation of the Sherman Act. Justice Douglas, writing in *Schwegmann,* could hardly have been more emphatic on this point. As we have seen, *Schwegmann* declared invalid a nonsigner provision in Louisiana which allowed, but did not compel, liquor distributors to impose minimum prices upon retailers at a time when Congress had not yet enacted laws allowing such provisions as an exception to the Sherman Act. Justice Douglas declared, "It is clear from our decisions under the Sherman Act [citations] that this interstate marketing arrangement would be illegal, that it would be enjoined, that it would draw civil and criminal penalties, and that no court would enforce it. Fixing minimum prices, like other types of price fixing, is illegal *per se.* [Citations.] Resale price maintenance was indeed struck down in *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.,* 220 U.S. 373. . . . The fact that a state authorizes the price fixing does not, of course, give immunity to the scheme, absent approval by Congress." (341 U.S. at p. 386 [95 L.Ed. at pp. 1043-1044].)

The department asserts, however, that the program involved here is not invalid because, unlike the circumstances in *Schwegmann,* a statute compels the imposition of minimum prices upon retailers, and, therefore the program is a sovereign act of the state exempt from the Sherman Act.

It is important to observe in this connection that the prices imposed upon the retailers are those determined in the sole discretion of the producers, and that the department does not participate in determining the minimum price, but only enforces the price set by the producers. Our

attention has not been called to any other comparable scheme in the country—in which the state polices by means of sanctions prices established by private interests—that has been judicially found exempt from the Sherman Act without the immunity provided by the Miller-Tydings Act and the McGuire Act.

We reject the assertion of the department and amicus curiae that the discretion of the producer in setting minimum prices is not absolute and that the department has the power to set a maximum price if the figure listed by the producer is unreasonable. They rely upon article XX, section 22, of the California Constitution, which sets forth the powers of the department regarding licensing the sale of alcoholic beverages and the provision in subdivision (f) of section 24755 which allows the department to grant "written permission . . . for good cause shown and for reasons not inconsistent" with the retail price maintenance law to sell below the price listed by the manufacturer.

There is nothing in either article XX, section 22, or in subdivision (f) of section 24755 which authorizes the department to set maximum prices for the purpose of promoting competition among liquor producers. In only one case has the department attempted to set a different price for distilled spirits than that posted by the producer—*Schenley Affiliated Brands Corp.* v. *Kirby* (1971) 21 Cal. App.3d 177, 186 [98 Cal.Rptr. 609]—and it was there held that the department did not have such authority. We have not been referred to any instance in which the department allowed a retailer to sell below the listed price "for good cause." Since a primary goal of the price maintenance program is asserted to be promotion of temperance, we seriously doubt that the setting of a maximum price by the department for the sole purpose of encouraging competition among producers would be consistent with the declared purpose of the program. Subdivision (f) appears to be directed to alleviating the hardship of an individual retailer who "for good cause" can show that he should be excepted from the minimum price requirement in a particular instance rather than authorizing the department to set maximum prices to enhance competition among producers.

On a number of occasions the United States Supreme Court has addressed the question whether the participation of a state in anticompetitive conduct is immunized from the Sherman Act. In *Parker* v. *Brown* (1943) 317 U.S. 341 [87 L.Ed. 315, 63 S.Ct. 307] and *Bates* v. *State Bar of Arizona* (1977) 433 U.S. 350 [53 L.Ed.2d 810, 97 S.Ct. 2691], the court held that the Sherman Act was not violated because the conduct involved was the sovereign act of the state which the Sherman Act did not prohibit. In *Cantor* v. *Detroit Edison Co.* (1976) 428 U.S. 579 [49 L.Ed.2d 1141, 96 S.Ct. 3110] and *Goldfarb* v. *Virginia State Bar* (1975) 421 U.S. 773 [44 L.Ed.2d 572, 95 S.Ct. 2004], a contrary conclusion was reached.

We proceed, then, to an analysis of these decisions to determine the principles which will exempt from the Sherman Act a price fixing program conducted under the auspices of the state.

Parker v. *Brown, supra,* 317 U.S. 341, the case in which the high court first enunciated the state action exemption, involved a California program designed to conserve the

agricultural resources of the state and to prevent economic waste in the marketing of raisins. Under that scheme, if a given number of producers in a particular area petitioned for the establishment of a marketing plan for raisins and a commission appointed by the Governor found that such a plan would enhance the state's objectives without premitting unreasonable profits to producers, the Director of Agriculture appointed a committee of producers to formulate a program, which was designed to compel producers to sell a certain proportion of their raisins at a price determined by the committee or producers. The commission was required to approve the program suggested by the committee, and had the power to modify it. If a certain number of producers in the area accepted the program, it became effective throughout the area.

In finding no violation of the Sherman Act, the court reasoned in part that the marketing plan was never intended to operate by force of individual agreement but derived its authority and efficacy from the legislative command of the state, and that the Sherman Act was not designed to restrain a state or its officers from activities directed by its Legislature. It was held that, because the state had created the machinery for establishing the program and had adopted and enforced it, acting through the commission, the restraints were imposed as an act of government which was not prohibited by the Sherman Act. It is the state "which adopts the program and which enforces it," the court emphasized. (317 U.S. at p. 352 [87 L.Ed. at p. 326].)

Cantor v. *Detroit Edison Co., supra,* 428 U.S. 579, is significant not only because of its holding on the facts

involved there, but because of its analysis of the state action exemption laid down in *Parker.* In *Cantor,* the Detroit Edison Company, which was the sole distributor of electricity in southeastern Michigan, supplied consumers with almost 50 percent of standard-size light bulbs. The charge for the bulbs did not appear separately in the billing, but was included in the general charges for electricity. This billing system and the rates charged by Detroit Edison were both approved by the Michigan Public Service Commission and could not be altered without the commission's approval. Petitioner was a retail druggist who filed a complaint against the utility, alleging that it was using its monopoly power in the distribution of electricity to restrain competition in the sale of bulbs, in violation of the Sherman Act.

The Supreme Court held that the state action exemption did not shield the utility from a charge of violating the act because the light bulb program did not implement a statewide policy, which was neutral on the question whether the utility should have such a program, and that the decision to institute the program was made by the utility and was merely approved by the regulatory body.

The analysis in *Cantor* of the prior holding in *Parker* is of interest. After discussing the contentions at some length, the court pointed out that Chief Justice Stone in *Parker* "carefully selected language which plainly limited the Court's holding to official action *taken by state officials.*" (Italics added; 428 U.S. at p. 591 [49 L.Ed.2d at p. 1150].) In a footnote, the court observed that Chief Justice Stone made 13 references in *Parker* to the fact that state action was involved and that "[e]ach time his language was care-

fully chosen to apply only to official action, as opposed to private action approved, supported, or even directed by the State . . . . [¶] The cumulative effect of these carefully drafted references unequivocally differentiates between official action on the one hand, and individual action (*even when commanded by the State*), on the other hand." (Italics added; *id.,* at p. 591, fn. 24 [49 L.Ed.2d at p. 1150].) Other passages in the *Cantor* opinion make it clear that *Parker* did not hold that the state action exemption applies to anticompetitive conduct which the state either approves or directs private parties to perform.[7]

Goldfarb v. *Virginia State Bar, supra,* 421 U.S. 773, considered state action under the Sherman Act in a different context. There, the question presented was whether adherence by attorneys to a fee schedule recommending minimum prices for common legal services published by a county bar association violated the act. Although membership in the association was voluntary, enforcement of the minimum fees was provided by the Virginia State Bar, the administrative agency through which the Virginia Supreme Court regulated the practice of law. The court held that this constituted a "classic illustration of price fixing" which was

[7]For example, the court declares that *Goldfarb* (discussed *infra*) cannot be read as a "guarantee that compliance with any state requirement would automatically confer federal antitrust immunity" (428 U.S. at p. 600 [49 L.Ed.2d at p. 1155]) and the opinion approves a caveat in *Parker* that " 'a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful' " (428 U.S. at p. 602 [49 L.Ed.2d at p. 1156]).

We note that in a recent case involving the application of the state action exemption to a subdivision of the state, the United States Supreme Court distinguished *Cantor* on the ground that it involved anticompetitive activities of private parties. (*City of Lafayette* v. *Louisiana Power & Light Co.* (1978) 435 U.S. 389 [55 L.Ed.2d 364, 98 S.Ct. 1123].)

not immunized from the prohibitions of the Sherman Act. In distinguishing *Parker,* the *Goldfarb* court pointed out that the state did not compel the bar association to adopt minimum fees, whereas in *Parker* the program was required by the state, acting as sovereign.

The fourth and most recent case involving the state action exemption is *Bates* v. *State Bar of Arizona, supra,* 433 U.S. 350, in which it was held that a rule of the Arizona Supreme Court prohibiting attorneys from advertising was exempt from the Sherman Act. The court distinguished *Goldfarb* on the ground that there the anticompetitive activity was not required by the state, whereas, since the Arizona Supreme Court was the "ultimate body wielding the State's power over the practice of law" the restraint was "compelled by direction of the State acting as a sovereign.' " (433 U.S. at p. 360 [53 L.Ed.2d at p. 821].) *Cantor* was distinguished on several grounds: the claim in *Cantor* was directed against a private party; the state had no independent regulatory interest in the market in light bulbs, and the program was instigated by the utility, with only the acquiescence of the state regulatory commission. In *Bates,* by contrast, the Arizona Court which adopted the rules was the real party in interest, control over advertising by attorneys had long been the subject of the state's oversight, the rule prohibiting advertising reflected a clear articulation of state policy, and the Arizona State Bar acted as the agent of the court and under its direct supervision. Significantly, the court also relied upon the fact that the rule was "subject to pointed re-examination by the policy maker—the Arizona Supreme Court—in enforcement proceedings." Thus, it was held, the concern that federal policy

was being unnecessarily subordinated to state policy was reduced. It was deemed significant that state policy "is so clearly and affirmatively expressed and that the State's supervision is so active." (433 U.S. at p. 362 [53 L.Ed.2d at p. 822].) The high court nevertheless invalidated the Arizona rule on the ground that it violated the First Amendment because of overbreadth.

We attempt, then, to isolate the characteristics which will qualify a program or rule as a sovereign act of the state so as to exempt it from the Sherman Act. It is clear that no exemption applies if the anticompetitive act is performed by a private association and is not compelled by the state (*Goldfarb*) or if the state merely approves anticompetitive conduct initiated by a private agency and the program does not effectuate any statewide policy (*Cantor*). It does not follow, however, that conduct by private parties under compulsion of state law is necessarily immune from the Sherman Act even if such conduct is designed to carry out a policy of the state.

The heart of the issue is whether the soverign act of the state which will immunize a price fixing law from the Sherman Act must be either the act of the state itself or one over which the state has the ultimate power of decision, or whether it is sufficient to invoke the exemption if, as in the program we here consider, the state compels private persons to engage in anticompetitive conduct and essentially exercises no control over the substance of their actions.

As mentioned above, we have discovered no decision which has gone so far as to hold that a program comparable

to that prescribed in section 24755 is exempt from the Sherman Act as being valid state action.

Neither *Parker* nor *Bates,* the two cases which found exemptions from the Sherman Act on the ground of state action, involved private conduct the substance of which was totally unconfined by state regulations. In *Parker*, although private persons had some voice in determining whether the prorate program should be instituted for a particular area, the final authority over the prices set in the program, as well as other details thereof was in the commission, a creature of the state, whose members were appointed by the Governor. In effect, the committee of producers which formulated the program and submitted it to a referendum merely had the right to recommend a program to the commission, which was required to approve the scheme and had the discretionary power to make modifications. *Cantor* could hardly have made it clearer that the *Parker* rule immunizes official action taken by state officers from the strictures of the Sherman Act, but that *Parker* did not decide private action condoned or directed by the state was exempt from the act. (Note, *Parker* v. *Brown Revisited: The State Action Doctrine After Goldfarb, Cantor, and Bates* (1977) 77 Colum.L.Rev. 898.)

In *Bates* the rule prohibiting advertising was a direct order of the state, acting through the Arizona Supreme Court. Even so, the court emphasized that the directive was subject to "pointed re-examination" by the Arizona court and its administration was actively supervised by the court so as to reduce the likelihood that federal antitrust policy would be unnecessarily subordinated to state policy.

In the price maintenance program before us, the state plays no role whatever in setting the retail prices. The prices are established by the producers according to their own economic interests, without regard to any actual or potential anticompetitive effect; the state's role is restricted to enforcing the prices specified by the producers. There is no control, or "pointed re-examination," by the state to insure that the policies of the Sherman Act are not "unnecessarily subordinated" to state policy. Thus, in our view, we would be extending the decisions of the United States Supreme Court beyond their intended design if we were to hold, as the department urges, that this scheme is immune from the Sherman Act.

The department asserts, however, that whatever congressional intent may have been with respect to exempting products other than liquor from the Sherman Act, the report of the Senate Judiciary Committee, which recommended repeal of the Miller-Tydings Act and the McGuire Act, made it clear that fair trade laws will not prohibit manufacturers of alcohol from enforcing resale prices in states which pass price fixing statutes pursuant to the Twenty-first Amendment.[8] This statement in the report

[8]The report states, "Liquor will not be affected by repeal of the fair trade laws in the same manner as other products because the Twenty-First Amendment to the Constitution gives the States broad powers over the sale of alcoholic beverages. Thus while repeal of the fair trade laws generally will prohibit manufacturers from enforcing resale prices, alcohol manufacturers may do such in States which pass price fixing statutes pursuant to the Twenty-First Amendment." (1975 U.S. Code, Cong. & Admin. News, at pp. 1569, 1571.)

represents only an opinion that the Twenty-first Amendment will allow continuation of price fixing for liquor in those states which properly allow such conduct—an issue which we discuss *infra*. We do not view this opinion as a declaration of antitrust policy. There is a "heavy presumption against implicit exemptions" to the Sherman Act (*Goldfarb*, *supra*, 421 U.S. 773, at p. 787 [44 L.Ed.2d 572, at p. 585]), and we conclude that the statement in the Senate report relied upon by the department does not allow us to read into the Sherman Act an exemption for liquor fair trade provisions which the act itself does not contain.

III

We consider next the department's contention that we are bound by prior decisions of this court to hold that section 24755 is not in conflict with the Sherman Act. The department places primary reliance upon *Samson Market Co.* v. *Alcoholic Bev. etc. Appeals Bd.*, *supra*, 71 Cal.2d 1215. In *Samson*, we were called upon to decide whether the change from the nonsigner method of controlling retail liquor prices to the present system of requiring the filing of minimum retail prices with the department violated the Sherman Act. We held that this change in the "mechanism" of fixing prices did not create a conflict with the Sherman Act. The department seizes upon this statement as a holding that section 24755 does not violate the Sherman Act as amended in 1975.

This contention is clearly without merit. The thrust of our holding in *Samson* was that the change in methodology did not amount to a difference in "substance and practical effect" so that our prior holding that the nonsigner provi-

sion did not unlawfully delegate legislative power to fix prices applied with equal force to the means now specified in section 24755. Moreover, *Samson* was decided in 1969, six years before the repeal of the McGuire Act. Thus, if we had addressed ourselves directly to the question, we would have been compelled to conclude that section 24755 —the provisions of which are identical "in substance and practical effect" to the nonsigner provision then exempted from the antitrust laws—was not in conflict with the Sherman Act.[9]

Nor do *Wilke & Holzheiser, Inc.* v. *Dept. of Alcoholic Bev. Control, supra*, 65 Cal.2d 349, or *Allied Properties* v. *Dept. of Alcoholic Beverage Control, supra,* 53 Cal.2d 141, conflict with our conclusion that section 24755 violates the Sherman Act. Neither of those cases considered this issue; at the time they were decided fair trade laws involving liquor as well as other products were exempted from the antitrust laws by the Miller-Tydings Act and the McGuire Act.

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[9]The exemptions under the Miller-Tydings Act and the McGuire Act covered contracts relating to products in free and open competition with commodities of the same general class produced by others. Section 24755 does not contain a requirement for a contract, nor the requirement that the liquor products to which the price posting provisions apply be in competition with one another. Based upon these differences, the department urges that the price posting program contained in section 24755 was not exempt from the Sherman Act, and therefore the statement in *Samson* that the section does not conflict with the Sherman Act is a direct holding on the issue now before us. We reject this assertion, for we held in *Samson* that the price posting program in section 24755 was in substance and effect identical to the nonsigner provision in the pre-1961 version of the section. Thus, the absence of a fair trade contract was deemed to be of no significance. Moreover, it had been held that free and open competition among the alcoholic beverages to which the section applies may be presumed. (*Reimel* v. *Alcoholic Bev. etc. Appeals Bd.* (1967) 256 Cal.App.2d 158, 173-174 [64 Cal.Rptr. 26].)

IV

(3a) We must next consider whether the Twenty-first Amendment permits California to fix resale prices of distilled spirits in spite of the Sherman Act. As we have seen, section 2 of the amendment provides, "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." The department contends this provision insulates price fixing of liquor authorized by a state from the prohibitions of the Sherman Act.

The board rejected this contention. It relied upon decisions holding the Twenty-first Amendment had not *pro tanto* repealed the commerce clause and which emphasized that the policies of each must be considered when they conflict. The board found the state's fair trade laws illsuited to perform their intended function, and consequently found that California's interest in continued operation of those laws was outweighed by the firm federal policy prohibiting price fixing, which would be frustrated if the fair trade statutes were upheld. Consequently, if tipped the balance in favor of the commerce-clause-based Sherman Act, and against the state regulations. The department contests the conclusion and the process by which it was reached by the board.

(4) It is axiomatic that consideration of any state regulation of intoxicating beverages must begin with the Twenty-first Amendment. Yet it is equally clear the inquiry does not terminate at that point. After *Hostetter* v. *Idlewild Liquor Corp.* (1964) 377 U.S. 324 [12 L.Ed.2d 350,

84 S.Ct. 1293], and *Sail'er Inn, Inc.* v. *Kirby, supra*, 5 Cal. 3d 1, it is settled that states do not have plenary powers over all matters relating to alcoholic beverages. When a statute enacted pursuant to the Twenty-first Amendment conflicts with an enactment based on the commerce clause, we must balance the policies furthered by each in order to determine which should prevail.

Hostetter was the first explicit articulation of the need to consider the commerce clause and the constitutional amendment in juxtaposition. In *Hostetter* a liquor retailer sold alcohol only to international airline passengers for use at their foreign destinations. It was claimed New York could not impose a state liquor license requirement upon the retailer because of the commerce clause. The Supreme Court agreed with this contention and rejected the state's claim of absolute power under the Twenty-first Amendment to regulate the passage of liquor through its territory.

The court summarized the line of cases commencing with *State Board* v. *Young's Market Co.* (1936) 299 U.S. 59 [81 L.Ed. 38, 57 S.Ct. 77], which declared that states were "totally unconfined" by traditional commerce clause limitations in restricting the importation of intoxicants. After reviewing *Young's Market* and its progeny, the court noted, "To draw a conclusion from this line of decisions that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification. If the Commerce Clause had been *pro tanto* 're pealed,' then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating

liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect. . . . [¶] Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." (*Id.*, at pp. 331-332 [12 L.Ed.2d at p. 356].)

In *Sail'er Inn, Inc.* v. *Kirby, supra*, 5 Cal.3d 1, we emphasized in even stronger terms the necessity of accommodating the policy of the Twenty-first Amendment to other fundamental policies. There, a state statute precluding the employment of women as bartenders was challenged under article XX, section 18, of the California Constitution, the federal Civil Rights Act, and the equal protection clauses of the state and federal Constitutions. First, we held the statute violative of article XX, section 18, which prohibits disqualification for any vocation on account of sex.[10] Next, we found the statute also violated the nondiscriminatory hiring provisions of the Civil Rights Act, flatly rejecting the claim that the Twenty-first Amendment precludes federal interference with state regulation of alcohol. Refusing to accept the facile interpretation of the amendment which was offered by the state, we noted, "Although some early cases painted state powers under section 2 of the Twenty-first Amendment with a broad brush, later decisions have taken a position more in keeping with the original intent of the amendment. . . . [¶] Thus it is apparent that the Twenty-first Amendment not only does not reach all alcoholic beverage cases which would otherwise fall within

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[10]This provision was amended in 1974 and renumbered section 8 of article I.

Congress' commerce clause powers, but even in those situations covered by the express language of the amendment, *some balancing and accommodation must take place.*" (*Id.* at p. 12; italics added.)

The department attempts to overcome the explicit adoption by *Hostetter and Sail'er Inn* of a balancing approach by raising several contentions. First, it focuses on *Seagram & Sons* v. *Hostetter* (1966) 384 U.S. 35 [16 L.Ed.2d 336, 86 S.Ct. 1254]. That case presented a challenge to a New York statute which was designed to eliminate the lingering effects of an earlier liquor resale price maintenance scheme. The statute required liquor wholesalers and retailers to affirm to the liquor authority of the state that their New York prices were no higher than prices at which similar liquor was sold anywhere in the United States during the preceding month. The court upheld the statute against challenges based upon the due process, equal protection and commerce clauses.

The department contends *Seagram & Sons* distinguished *Hostetter* as a case in which state regulation was struck down because it was regulating liquor not destined for use in the state. According to the department, state power to regulate intoxicants which will be used in the state remains virtually unconditional.

We do not read *Seagram & Sons* as stating such a broad rule. While the court did make a distinction between the case there under consideration and *Hostetter* on the ground that the latter involved regulation of liquor for use outside the state, whereas the rule considered in *Seagram & Sons* related to liquor to be consumed within the regulating state,

the distinction was made for the purpose of determining whether the regulation placed an unconstitutional burden on interstate commerce. (384 U.S. at p. 45 [16 L.Ed.2d at p. 344].) After concluding that no such burden was established, the court went on to determine whether, under the supremacy clause, there was a conflict between the state's price regulation and the Sherman Act and other federal antitrust statutes. If, as the department contends, state regulation of liquor to be used within the state is immune from attack because the Twenty-first Amendment affords states plenary powers over liquor consumed within their borders, free of the restrictions imposed by the Sherman Act, there would have been no necessity for the court to discuss the merits of the antitrust claims.

Indeed, the court in *Seagram & Sons* acknowledged that the Twenty-first Amendment does not insulate state regulations which apply only to liquor consumed within a state from federal antitrust statutes, for it recognized that there was a potential conflict between the regulation involved there and federal law. (384 U.S. at p. 46 [16 L.Ed.2d at pp. 344-345].)[11]

Moreover, the distinction advanced by the department fails to take into account our decision in *Sail'er Inn*, which

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[11]The department's views as to the reach of the Twenty-first Amendment are supported by *National Railroad Passenger Corporation* v. *Miller* (D.Kan. 1973) 358 F.Supp. 1321, and by dictum in *Washington Brewers Institute* v. *United States* (9th Cir. 1943) 137 F.2d 964, decided a number of years before *Hostetter*. Although the department attempts to distinguish *Schwegmann* on the ground that it involved an interstate marketing scheme, for the reasons stated above, we do not view that distinction as persuasive.

makes clear that state regulation of alcoholic beverages to be used within the state is still subject to a commerce clause enactment in certain circumstances.

The department also attempts to evade *Sail'er Inn.* It contends the decision turned primarily on our own constitutional provision, and in any event, is inapposite because the California statute regulated employment, not liquor. Neither distinction undercuts the central thrust of *Sail'er Inn.* While we could have grounded our decision solely on the California Constitution, we did not. We expressly considered the federal Civil Rights Act and gave detailed attention to whether it was negated by the Twenty-first Amendment. Nothing said detracts from its holding that a balancing process is required in deciding whether a state's power over liquor is plenary.

Next, the department relies upon *California* v. *LaRue* (1972) 409 U.S. 109 [34 L.Ed.2d 342, 93 S.Ct. 390]. In *LaRue* bar owners challenged the constitutionality of regulations of the department limiting the type of entertainment which could be presented in taverns holding liquor licenses. The regulations were upheld; the court found the Twenty-first Amendment gave them an added presumption of validity. *LaRue* did not, however, cast doubt on the need to accommodate and balance. The decision must be explained as a case in which the balance was struck in favor of the state regulation. Nowhere does *LaRue* state that the "added presumption" obviates the need to balance federal policy against a state's interest, or the Twenty-first Amendment against the commerce clause.

The most recent discussion of the Twenty-first Amendment reaffirms that the amendment does not except all state laws involving liquor from every commerce clause enactment. In *Craig* v. *Boren* (1976) 429 U.S. 190 [50 L.Ed.2d 397, 97 S.Ct. 451], an Oklahoma statute specifying different drinking ages for men and women was declared unconstitutional under the equal protection clause. The interest of the state in controlling liquor under the Twenty-first Amendment was held insufficient to overcome a challenge to the statute. The court stated, "[t]he Amendment primarily created an exception to the normal operation of the Commerce Clause. [Citations.] Even here, the Twenty-first Amendment does not *pro tanto* repeal the Commerce Clause, but merely requires that each provision 'be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.'" (*Id.*, at p. 206 [50 L.Ed.2d at p. 412].)[12]

V

(3b) Therefore, we must undertake a balancing process in the present case. We must ascertain what policies are furthered by the state's system of permitting producers to fix retail prices, whether the retail price maintenance provisions clearly vindicate those policies, and whether and to what degree the policy underlying the Sherman Act is undermined by the state's program.

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[12]It is beyond dispute that the Twenty-first Amendment does not permit states to enact liquor laws in disregard of the due process or equal protection clauses. *Wisconsin* v. *Constantineau* (1971) 400 U.S. 433 [27 L.Ed.2d 515, 91 S.Ct. 507], held a state law authorizing the "posting" of the names of excessive drinkers was not exempt from compliance with due process requirements. *Craig* v. *Boren, supra,* reaches the same result under the equal protection clause.

The purposes of the liquor price maintenance law are to promote temperance and orderly marketing conditions.[13] In *Allied Properties* v. *Dept. of Alcoholic Beverage Control, supra,* 53 Cal.2d 141, and *Wilke & Holzheiser, Inc.* v. *Dept. of Alcoholic Bev. Control, supra,* 53 Cal.2d 141, and *Wilke & Holzheiser, Inc.* v. *Dept. of Alcoholic Bev.Control, supra,* 65 Cal.2d 349, we upheld the constitutionality of these laws against the challenge that they constituted an improper exercise of the police power. In making our determination, we were guided by the settled rule applicable to a claim that a statute exceeds the police power: "In passing upon the fair trade provisions we must be guided by the well-settled principles that the presumption is in favor of constitutionality and that the validity of an act of the Legislature must be clear before the statute can be declared unconstitutional. It is not our province to weigh

[13]Section 23001 provides: "This division is an exercise of the police powers of the State for the protection of the safety, welfare, health, peace, and morals of the people of the State, to eliminate the evils of unlicensed and unlawful manufacture, selling, and disposing of alcoholic beverages, and to promote temperance in the use and consumption of alcoholic beverages. It is hereby declared that the subject matter of this division involves in the highest degree the economic, social, and moral well-being and the safety of the State and of all its people. All provisions of this division shall be literally construed for the accomplishment of these purposes."

Section 24749 provides: "It is the declared policy of the State that it is necessary to regulate and control the manufacture, sale, and distribution of alcoholic beverages within this State for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to the law. In order to eliminate price wars which unduly stimulate the sale and consumption of alcoholic beverages and disrupt the orderly sale and distribution thereof, it is hereby declared as the policy of this State that the sale of alcoholic beverages should be subjected to certain restrictions and regulations. The necessity for the enactment of provisions of this chapter is, therefore, declared as a matter of legislative determination."

the desirability of the social or economic policy underlying the statute or to question its wisdom; they are purely legislative matters. [¶] Where, as here, it is argued that a statute does not constitute a proper exercise of the police power, the inquiry of the court is limited to determining whether the object of the statute is one for which that power may legitimately be invoked and, if so, whether the statute bears a reasonable and substantial relation to the objects sought to be attained . . . . [¶] The means provided in a statute must be accepted as being reasonably designed to accomplish its objective unless it is unquestionable that they are improper." (53 Cal.2d 141, 146, 148.)

Applying this standard, we determined that the Legislature's objectives were valid and that the means employed were not patently improper. We held that the Legislature could rationally conclude that the public would be adequately protected against excessive prices by the ordinary play of competition among manufacturers, that the elimination of price cutting on the retail level would promote temperance, and that competition among the relatively few producers and wholesalers would not result in disorderly marketing conditions. Moreover, the provisions did not unlawfully delegate legislative power because, although producers of liquor, like manufacturers under the general fair trade law, set prices in accordance with their own economic interests, they indirectly carried out the purposes of the Legislature. We observed in *Allied Properties* that most courts which had considered the issue had upheld the constitutionality of liquor fair trade laws.

In *Wilke & Holzheiser* we reconsidered our decision in *Allied Properties* in the face of a challenge based upon the

circumstance that since 1959, when the latter was decided, a majority of states had held mandatory price maintenance provisions, nonsigner provisions or fair trade laws to be unconstitutional. We again emphasized that the Legislature's assumption that the price maintenance provisions would promote temperance and orderly marketing conditions were not unquestionably "'"arbitrary and beyond rational doubt erroneous"'" (65 Cal.2d at p. 361), and we reaffirmed our holding in *Allied Properties*.

In the present case, we are engaged in a different exercise. The connection between the means employed by the Legislature and the ends sought to be attained is not clothed with the same presumptions applied in considering an assertion that the state has exceeded its police power. Rather, as *Hostetter* and *Sail'er Inn* command, we must balance California's interest in promoting temperance and orderly marketing conditions by the method set forth in section 24755 against the policy underlying the Sherman Act.

That policy was cogently described by Justice Black in *Northern P. R. Co. v. United States* (1958) 356 U.S. 1, 4-5 [2 L.Ed.2d 545, 549, 78 S.Ct. 514]: "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the

policy unequivocally laid down by the Act is competition. . . ."

(5) In the vindication of this policy any combination which tampers with the price structure is unlawful. Although the participants in a price fixing scheme may be in no position to control the market, to the extent that they raise, lower or stabilize prices they violate the act, and this is so even if the prices fixed are reasonable. (*U.S.* v. *Socony-Vacuum Oil Co.* (1940) 310 U.S. 150, 221-223 [84 L.Ed. 1129, 1167-1168, 60 S.Ct. 811]; *U.S.* v. *Trenton Potteries* (1927) 273 U.S. 392, 397 [71 L.Ed. 700, 705, 47 S.Ct. 377, 50 A.L.R. 989].)

It is well established that resale price fixing is illegal under the Sherman Act (*Schwegmann*) and we have concluded above that such conduct is not exempt from the act because it is performed under the compulsion of state law. The imposition of a retail price by a producer is a clear violation of federal law absent such an exemption.

The provision we here consider has the effect not only of allowing illegal vertical restraints on competition—i.e., resale prices specified by producers and imposed upon retailers—but horizontal restraints as well. Corsetti argued before the board, as he does in this court, that section 24755 is an "open invitation to price-fixing" among producers and that there is in fact no meaningful price competition among nationally advertised brands of liquor in California. The board agreed with this assertion.

Corsetti offers the following evidence: In July 1976, five leading brands of gin cost $4.89 for a fifth of a gallon,[14] and in July 1976, three of the five best selling brands of bourbon whiskey cost $5.49 a fifth, and the fourth cost 1 cent more.[15] Five leading brands of scotch whiskey sold for $8.39 or $8.40 a fifth in July 1976.[16] Between July 1971 and July 1976 the prices for the most popular brand of scotch (J&B) and the fourth leading scotch (Johnny Walker Red Label) were identical; a rise in the price of one was followed by a precise price rise in the other within the same month.[17] Moreover, as indicated in the margin, the price differential between leading brands of distilled liquor has gradually decreased since 1955 so that, for example, while there was a 50-cent difference between two of

[14]

Brand	July 1955	July 1961	July 1966	July 1971	July 1976
Gordon's	4.25	4.29	4.29	4.69	4.89
Gilbey's	4.09	4.19	4.24	4.59	4.89
Seagram's	4.39	4.39	4.39	4.65	4.89
Burton's	3.89	3.99	3.99	3.99	4.89
Schenley	4.09	4.19	4.19	4.29	4.89

[15]In 1975 four of the five best selling bourbons in the United States were Jim Beam, Early Times, Old Crow and Ancient Age. The first three were posted at $5.49 a fifth in July 1976, and the last, Ancient Age, cost one cent more.

[16]

Brand	July 1961	July 1966	July 1971	July 1976
Whitehorse	6.59	7.05	7.50	8.40
Haig & Haig	6.69	7.07	6.49	8.39
Vat 69	6.55	6.99	7.50	8.39
J & B	7.25	7.25	7.60	8.40
J. Walker Red	6.55	7.05	7.60	8.40

[17]In July 1961, a fifth of J&B cost $7.25, while a fifth of Johnny Walker Red cost $6.55. Five years later, J&B was still at $7.25 and Johnny Walker Red had risen to $7.05. By July 1971, the two had reached an identical price of $7.60 a fifth. In April 1972, both raised the price to $7.80 a fifth, where it remained until May 1974, when both raised their prices to $8.40 a fifth, and there it remained as of July 1976.

the five leading brands of gin in July 1955, the price of all five was exactly the same by July 1976, and although there was a 70-cent price difference between two of the five leading brands of scotch in July 1961, that difference was only 1 cent by July 1976.[18]

It was apparently on the basis of such evidence that a California Senate committee stated, in a report relied upon by the board, that the retail price maintenance system in California "has resulted in the elimination of any semblance of competition within the industry." (Sen. Select Com. Rep. on Laws Relating to Alcoholic Beverages (1974) vol. 1, p. 9.) The committee also concluded that because of the program, "the consumer pays about the highest retail prices for liquor, beer and wine in the country, although the state levies one of the lowest excise taxes on these beverages." (*Id.*, at pp. 82-83).

It is urged that these statistics present an inaccurate picture because there are in fact wide differences in prices among liquors of the same type. In support of this assertion, figures are cited which indicate that there is a substantial difference in price between some brands of liquor of the same type,[19] and that there is a marked price

[18]The department and amicus curiae insist that we may not rely upon the figures proffered by Corsetti because they were not presented to the department. However, the information was derived from the price postings filed with the department pursuant to section 24755 and department rules. They were relied upon by the board, and we may take judicial notice of them. (Evid. Code, §§ 452, subd. (h), 459.)

[19]In April 1977 Lord Douglas scotch sold for $5.49 a quart, whereas Chivas Regal cost $15.79; Czarina Vodka was listed at $4.49 a quart and Smirnoff at $7.40; and the price for a quart of gin ranged from $3.81 for Smolka to $9.28 for Beefeater's.

differential between some roughly equivalent brands.[20] However, that there may be some interbrand competition does not detract from the circumstance that among leading brands there is a uniformity of price which persuasively demonstrates the absence of "free and unfettered competition" in the California liquor industry. Indeed, the posting system facilitates price fixing among producers. While it may be a per se violation of the Sherman Act for competitors to exchange price information on a regular basis (*United States* v. *Container Corp.* (1969) 393 U.S. 333, 336-337 [21 L.Ed.2d 526, 529-530, 89 S.Ct. 510]), producers may readily determine the prices charged by their competitors by referring to the prices filed with the department or to industry publications listing the posted prices. (Cal. Admin. Code, tit. 4, § 99.2, subd. (b)(2).)

In our view, the price maintenance provisions embodied in section 24755 clearly violate the policy underlying the Sherman Act.

On the other side of the balance, the price maintenance provisions are designed, as we have seen, to promote temperance and orderly marketing conditions. The promotion of orderly marketing conditions, i.e., preventing bargain sales, price cutting and similar selling practices on the retail level, has two aspects—to reduce excessive consumption, thereby encouraging temperance, and to protect small licensees from predatory pricing policies of large retailers.

[20]Johnny Walker Red Label scotch sold for $14.50 a quart while J&B Rare Scotch was $10.60 a quart; Smirnoff and Wolfschmidt Vodka sold for $7.40 and $6.50 a quart respectively, and Kessler brand blended whiskey was listed at $6.19 a quart whereas Seagram 7 Crown sold for $5.99.

The board rejected the argument that fair trade laws were necessary to the economic survival of small retailers, relying upon studies described in the report of the Senate Judiciary Committee which recommended repeal of the Miller-Tydings Act and the McGuire Act. These studies revealed that the absence of fair trade laws had not injured small retailers: states with fair trade laws had a 55 percent higher rate of firm failures than free trade states, and the rate of growth of small retail stores in free trade states between 1956 and 1972 was 32 percent higher than in states with fair trade laws.[21] (1975 Code Cong. & Admin. News, *op. cit.*, p. 1571.)

Amicus curiae asserts that because package liquor stores and small grocery stores rely upon liquor sales for their economic existence, any tampering with the fair trade laws

[21]The report declares in part, "No evidence was presented to indicate that there were destructive predatory practices in states which had repealed fair trade laws. Nor were there bad effects in Canada which repealed its fair trade laws in 1957 or in Great Britain which repealed such laws in 1965. A study published in 1969 reports small retailers were not driven out of business and predatory price cutting was rare in the four years following repeal in Great Britain. Similar experiences have been reported in Canada.

"Moreover, statistics gathered by the Library of Congress indicate that the absence of fair trade has not harmed small business. Using Dun and Bradstreet data, the Library of Congress found the 1972 firm failure rate in 'fair trade' states which have the nonsigner provision was 35.9 failures per 10,000 firms, in 'fair trade' states without the nonsigner provision the rate was 32.2 failures per 10,000 firms, while the failure rate in free trade States averaged 23.3 failures per 10,000 firms—in other words, 'fair trade' States with fully effective laws have a 55 percent higher rate of firm failures than free trade States.

"Finally, the traditional argument that fair trade protects the 'mom and pop' store from unfair competition is not borne out by the statistics. Between 1956 and 1972 the rate of growth of small retail stores in free trade states (including states which repealed 'fair trade' during this period) is 32 percent higher than the rate in 'fair trade' states."

will have drastic consequences,[22] that New York experienced severe economic dislocation in the liquor industry after it repealed its fair trade laws,[23] that monopoly at the retail level will be increased without fair trade,[24] and that consumers will ultimately suffer because they will have a smaller number of liquor brands to select.

These arguments are aimed largely at protecting the economic interests of small retailers. They were considered and rejected by Congress when it determined in the Consumer Goods Pricing Act of 1975 to prohibit the states from enacting fair trade laws. While it is true that the liquor industry is heavily regulated and, therefore, competition in the industry may be inhibited to a greater extent than in other enterprises, this factor does not justify the continuation of fair trade laws which eliminate price competition among retailers.

The second and the major declared purpose for retail price maintenance of liquor is to promote temperance. The

[22]Amicus relies upon a 1974 report of the Department of Finance, entitled Alcohol and the State: A Reappraisal of California's Alcohol Control Policies. This report, while critical of fair trade laws, states that economic dislocation would result from abrupt changes in those laws, and recommends a gradual 10-year modification, with termination occurring only after the economic consequences are examined.

[23]In this connection, amicus cites a 1971 report of the New York Senate Excise Committee which found price cutting, lack of normal competition, and other evils in the liquor industry after repeal of the fair trade laws.

[24]It is asserted that the larger chain operations would sell at or below cost on a short term basis, thereby driving small independent retailers out of business, and once small retailers had been eliminated, a monopoly would exist and prices would stabilize as high as the market could bear. This overlooks the prohibition against loss leader sales contained in Business and Professions Code section 17044, and other proscriptions against unfair business practices.

board determined that these provisions do not promote temperance, relying upon a report of the Moreland Commission in New York, cited in *Seagram & Sons, Inc.* v. *Hostetter, supra*, 384 35, 39 [16 L.Ed.2d 336, 340]. According to that report, "compulsory resale price maintenance had had 'no significant effect upon the consumption of alcoholic beverages, upon temperance or upon the incidence of social problems related to alcohol.' "

A 1974 study referred to above found that per capita consumption of distilled spirits in California had increased by 42 percent between 1950 and 1972, and it concluded that "There is little compelling evidence to suggest that . . . fair trade . . . promote[s] temperance or contribute[s] in any significant way to the minimization of the current problem of alcohol abuse." (Alcohol and the State: A reappraisal of California's Alcohol Control Policies, *op. cit.*, pp. xi, 15.) Other authorities reach similar conclusions. (See, e.g., Sen. Select Com. Rep. on Laws Relating to Alcoholic Beverages, *op. cit.*, vol. 3, p. 69; Dunsford, *State Monopoly and Price-Fixing in Retail Liquor Distribution*. 1962 Wis.L.Rev. 454, 483.)[25]

Thus, while we concluded in *Atlas Properties* and *Wilke & Holzheizer* on the basis of presumptions regarding the validity of the Legislature's exercise of the police power

[25]A witness before the Senate committee stated that when New Mexico repealed its liquor fair trade law, consumption at first rose slightly, and then declined to a point lower than it had been while fair trade laws were in effect.

Dunsford states, "What evidence is available on the experience since 1934 casts doubt on whether the monopoly or price-fixing systems of control have any substantial temperance advantage in dealing with the unquestioned social risks of intoxicating liquors." (1962 Wis.L.Rev. at p. 483).

that we could not hold the connection between retail price maintenance and temperance was unquestionably "arbitrary and beyond rational doubt erroneous" the studies referred to above at the very least raise a doubt regarding the justification for such laws on the ground that they promote temperance.

Another factor in the balancing process is that fair trade laws generally are now contrary to public policy. This is demonstrated by Congress' reinstatement of the Sherman Act prohibitions, by the repeal in California of fair trade laws for products other than liquor (Stats. 1975, ch. 402, p. 878), as well as the recent modification of price maintenance provisions relating to the sale of milk (Stats, 1977, ch. 1192, [No. 5 Deering's Adv. Legis. Service] p. 118). Indeed, Corsetti points out that only two states, Massachusetts and Connecticut, currently retain mandatory retail price posting relating to liquor. Every state would appear to have an interest in the temperance of its inhabitants; the implication is clear, therefore, that resale price maintenance has not been found to be critical to achieve this goal in the vast majority of jurisdictions.

Finally, we find persuasive the argument that there are other means to achieve the fundamental goals of the price maintenance laws without running afoul of the Sherman Act. Thus, our laws prohibit the sale of any product as a "loss leader" (Bus. & Prof. Code, § 17044) and licensees may not offer any gift or premium in connection with the sale of alcohol (§ 25600). Other suggestions to carry out the policy of promoting temperance and orderly marketing conditions have been advanced. (See, e.g., Alcohol and the

State: A Reappraisal of California's Alcohol Control Policies, *op. cit.*, p. 15.)

(3c) In sum, we find that the policies underlying the Sherman Act are clearly violated by the liquor price maintenance laws, and that on the other side of the balance there is doubt whether such laws promote temperance, there is a clear national trend against fair trade laws, and there exist means other than mandatory price fixing to achieve the ends which those laws seek to attain. We conclude, therefore, that the policies underlying the Sherman Act must prevail, and that the price maintenance provisions embodied in section 24755 are invalid.

In view of this conclusion, we need not decide whether, as the board determined, section 24755 also violates equal protection of the laws.

VI

The order of the board in Rice v. Alcoholic Beverage Control Appeals Board is affirmed. The writ of review filed by Young's Market is discharged and that petition is dismissed.

Tobriner, Acting C. J., Clark, Richardson, J., Newman, J., Taylor, J.,* and Racanelli, J.,* concurred.

Petitioner's application for a rehearing in No. 23631 was denied June 29, 1978. Bird, C. J., and Manuel, J., did not participate therein.

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*Assigned by the Chairperson of the Judicial Council.

Appendix D

In the Court of Appeal
of the
State of California

First Appellate District

Division Two

1 Civil No. 44862

Capiscean Corporation,
Petitioner,

vs.

Alcoholic Beverage Control Appeals Board,
Respondent;

Department of Alcoholic Beverage Control,
Real Party in Interest.

[Filed Jan. 2, 1979]

OPINION

ROUSE, J.—In this extraordinary writ proceeding, authorized by section 23090 of the Business and Professions Code,[1] we consider the validity of fair trade laws regulating the sale of wine in this state, in light of the ruling in *Rice* v. *Alcoholic Bev. etc. Appeals Bd.* (1978) 21 Cal.3d 431

[1]Unless otherwise indicated, all statutory references are to the Business and Professions Code.

[146 Cal.Rptr. 585, 579 P.2d 476], which invalidated California's price maintenance laws relating to distilled spirits. The matter arose as follows:

On November 22, 1976, petitioner, holder of an off-sale general alcoholic beverage license issued by the Department of Alcoholic Beverage Control (hereafter Department) sold a quart of Old Crow whiskey to an employee of the Department for $1.63 less than the minimum price and a magnum of Cresta Blanca wine for 92 cents less than the posted price. On November 30, 1976, petitioner sold another bottle of Old Crow whiskey to the same employee for $1.63 less than the minimum price. After notice and hearing, the Department found that petitioner had violated section 24755 and title 4, section 99, subdivision (a), of the California Administrative Code in the sale of distilled spirits, and section 24862 and title 4, section 101, subdivision (a) in the sale of wine. The Department ordered petitioner's license suspended for 10 days on each of the three counts, the penalties to be served concurrently. On appeal to the Alcoholic Beverage Control Appeals Board (hereafter Board), the Board, following *Rice,* reversed the decision of the Department with respect to the counts alleging sale of distilled spirits below the minimum price, but affirmed the decision of the Department with respect to the count alleging sale of wine below the posted price. The Board believed itself prohibited from declaring the wine price maintenance provisions invalid by reason of article III, section 3.5 of the California Constitution.[2] (1) Petitioner

[2]Article III, section 3.5 of the California Constitution, approved by the people at the primary election held June 6, 1978, provides: "An administrative agency, including an administrative agency

seeks annulment of that portion of the Board's order affirming the decision of the Department, contending that the ruling in *Rice, supra* (21 Cal.3d 431) should be extended to invalidate wine price maintenance provisions as well.

We have compared the statutes and regulations relating to price maintenance of distilled spirits invalidated in *Rice* with the statutes and regulations relating to price maintenance of wine challenged in this proceeding, and find no significant differences. Although the statute invalidated in *Rice* (§ 24755) is more comprehensive than the statute challenged in this proceeding (§ 24862),[3] section 24862, construed in conjunction with the other sections contained in

created by the Constitution or an initiative statute, has no power: [¶] (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional; [¶] (b) To declare a statute unconstitutional; [¶] (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations."

[3]Section 24862: "No licensee shall in this state sell or resell to a retailer, and no retailer shall in this state buy any item of wine except at the selling or resale price thereof contained either in an effective price schedule or in an effective fair trade contract as authorized by Chapter 10 of this division [commencing with Section 24749], unless otherwise provided in this chapter.

"No licensee in this state shall sell or resell to a consumer any item of wine at less than the selling or resale price thereof contained either in an effective price schedule or in an effective fair trade contract as authorized by Chapter 10 (commencing with Section 24749) of this division unless otherwise provided in this chapter.

"Wine sold pursuant to a bona fide order accepted on the last business day of any month may be delivered to the purchaser, at the price in effect during said month, within two business days immediately following the last day of the month in which the sale was made."

chapter 11 (§ 24866 et seq.),[4] accomplishes the same end. Section 24866, for example, requires winegrowers, wholesalers licensed to sell wine, wine rectifiers and rectifiers to post schedules of selling prices of wine, make and file fair trade contracts and file schedules of resale prices. Section 24862 prohibits an off-sale retail licensee from selling at less than that prescribed price.

We agree with petitioner that the wine price maintenance provisions of section 24862 and related statutes differ from the price maintenance provisions relating to distilled spirits only in the type of beverage and the precise language of the respective sections, and that the impact of the restrictions is identical. As respondent Board acknowledges, the arguments in favor of retail price maintenance rejected by the California Supreme Court in *Rice, supra* (21 Cal.3d 431) cannot be accepted here. We conclude that the wine price maintenance provisions cannot be distinguished from the price maintenance provisions invalidated in *Rice* and, for the reasons stated in *Rice,* must also fall.

That portion of the Board's order affirming the decision of the Department with respect to alleged violations of the wine price maintenance schedule (count two) is annulled. The Board is directed to enter its order reversing the decision of the Department with respect to count two.

Taylor, P. J., and Kane, J., concurred.

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[4]Section 24866: "Each wine grower, wholesaler licensed to sell wine, wine rectifier, and rectifier shall:

"(a) Post a schedule of selling prices of wine to retailers or consumers for which his resale price is not governed by a fair trade contract made by the person who owns or controls the brand.

"(b) Make and file a fair trade contract and file a schedule of resale prices, if he owns or controls a brand of wine resold to retailers or consumers."

Appendix E

Before the Alcoholic Beverage Control Appeals Board
of the State of California

In the Matter of Accusation Against Anthony C. Ferrigno dba Consumers Distributing 1350 - 17th Street San Francisco, CA 94107 Beer and Wine Importer, Beer and Wine Wholesaler, Off-sale Beer and Wine licenses Respondent and Licensee Under the Alcohol Beverage Control Act.	AB-4637 File 3221; Reg. 9534 Date and Place of Hearing: March 8, 1979 350 McAllister Street San Francisco, CA For Dept.: Honorable George Deukmejian Attorney General Matthew Boyle, Deputy Attorney General For Appel: James Reilly, Attorney

[Filed May 31, 1979]

Appellant has appealed a decision of the department of Alcoholic Beverage Control which determined that cause for disciplinary action exists pursuant to Article XX, section 22 of the California Constitution and Business and Professions Code section 24200(a) as to each of Counts I through V; that additional cause for disciplinary action exists pursuant to Business and Professions Code section 24200(b) in that appellant has violated or has permitted violation of section 25000 of that code and section 105(b), Title IV, California Administrative Code as to Count I, section 25000.5 of the Business and Professions Code as to Counts II and III, section 25004 that code as to Count IV, and sections 23355 and 24040 of that code as to Count V. As a penalty, it was ordered that appellant's license be

suspended separately and severally, for ten days each on Counts I through V, inclusive; provided, however, that the suspensions shall run concurrently for a total suspension of ten days.

The department's decision further provides:

"FINDINGS OF FACT:

"COUNT I

"It was stipulated as true that respondent did sell malt beverages, more fully described in Exhibit "A", attached hereto and made part hereof as if fully set forth, to licensed retailers in counties, for which a Malt Beverage Schedule was not filed or posted with the Department.

"COUNT II

"It was stipulated as true that on or about the dates set forth below, the respondent wholesale licensee sold Carlsberg Malt Liquor to a retail licensee in Butte County, without having a territorial agreement with the manufacturer for Butte County.

"Retail Licensee	Date of Invoice	Invoice No.
Villa Gourmet, Chico	August 3, 1977	25154
Villa Gourmet, Chico	July 21, 1977	13820

"COUNT III

"It was stipulated as true that on or about the dates set forth below, the respondent wholesale licensee sold McEwan's Tartan Ale and Leopard Lager to a retail licensee in Santa Cruz County, without having a territorial contract agreement filed with the manufacturer for Santa Cruz County.

"Retailer	Date of Invoice	Invoice No.
King's Liquor, Capitola	August 8, 1977	25505

"COUNT IV

"It was stipulated as true that on or about the dates set forth below, the respondent wholesale licensee did sell Lucky Lager beer in 11 oz. No return bottles posted at $1.80 per 12-pack bottles, to licensed retailers, as set forth below, at $1.70 per 12-pack bottles.

"Date of invoice	Invoice No.		
7-26-77	14265	Brentwood Mkt.	12 Plaza Dr., Pacifica
8- 9-77	26259	Brentwood Mkt.	12 Plaza Dr., Pacifica
8-15-77	26393	Stagi's Liq.	3055-16th St., S.F.
8-16-77	27301	Brentwood Mkt.	12 Plaza Dr., Pacifica
8-16-77	26964	Bell Mkt.	1390 Silver, S.F.
8-15-77	26954	Gala Foods	201 Leland, S.F.
8-19-77	27050	Payless Drug Store	3975 Alemany, S.F.
8-16-77	26399	Gala Foods	690 Stanyan St., S.F.
8-22-77	27258	Brentwood Liq.	215 Kenwood Way, So. S.F.
8-23-77	27790	Gala Foods	1095 Hyde St., S.F.
8-23-77	26864	Brentwood Mkt.	12 Plaza Dr., Pacifica
8-26-77	28341	Payless Drug Store	3975 Alemany, S.F.
8-29-77	28577	Gala Foods	1445 Sutter St., S.F.
8-29-77	28577	Long's Drug Store	#10 Bayhill, San Bruno
8-30-77	28550	Gala Foods	690 Stanyan St., S.F.

"COUNT V

"It was stipulated as true that on or about August 8, 1977, the respondent wholesale licensee did deliver malt beverages, as set forth below, to 855 Park Avenue, San Jose, a premises for which there has not been issued a valid permit or alcoholic beverage license.

"Retail Licensee	Invoice Date	Invoice No.
King's Liquor, Capitola	25505 (sic)	August 8, 1977 (sic)

This appeal is based on the provisions of Business and Professions Code section 23084.

At the department hearing, counsel for the parties stipulated as to the truth of the facts set forth in Counts I, IV and V of the accusation (R.T. 2, 6). The facts contained in Counts II and III of the accusation were also stipulated too, except as to the words "without having a territorial agreement . . ."; in lieu thereof, it was stipulated that no terri-

torial agreement was filed with the Department of Alcoholic Beverage Control (R.T. 6).

Anthony C. Ferrigno, the licensee, testified he holds a beer and wine wholesaler's license, beer and wine importers license and an off-sale beer and wine license. The witness stated that as to Count II of the accusation, he had an agreement with the manufacturer of Carlsburg Malt Liquor that he could sell it anywhere in Northern California; the department of ABC was informed thereof but refused to accept an agreement which referred to "Northern California", requiring that the specific counties be listed; when this was done, Butte County was overlooked (R.T. 8). As to Count III, he thinks it was also written up as "Northern California" but, when changed, it is possible that Santa Cruz County was omitted from the list; nevertheless, he did have an understanding or an agreement with the manufacturer that he could sell McEwans Tartan Ale and Leopard Lager in Santa Cruz County (R.T. 9A). With regard to Count V, the licensee testified they did deliver malt beverages to a hardware store located at 855 Park Avenue in San Jose, which beverages had been sold to King's Liquor, the holder of a retail liquor license in Santa Cruz (Capitola, R.T. 11)(R.T. 8-9); this was because the appellant, being "stuck for time", agreed to meet a representative of King's Liquor at 855 Park Avenue in San Jose; since the latter was not there, he left the malt beverages at this address; King's Liquor subsequently paid for these malt beverages (R.T. 9-10).

At the conclusion of the department hearing, Count V of the accusations was amended, over objection, to include a

violation of Business and Professions Code section 24040 (R.T. 15-16).

Documents relating to the above violations were received in evidence as Department's Exhibit 1.

It is contended on appeal that the ruling as to Counts I, II, III and IV should be reversed since Business and Professions Code sections 25000, 25000.5 and 25004, concerning beer, which appellant was determined to have violated, are similar to those statutes declared invalid by reason of the Sherman Antitrust Act in *Rice* v. *ABC Appeals Board and Corsetti,* 21 Cal.3d 431 and *Capiscean Corporation* v. *ABC Appeals Board and Department of Alcoholic Beverage Control,* 87 Cal.App.3d 996, which related to distilled spirits and wine, respectively.

COUNT I:

As to Count I, the licensee was determined to have violated Business and Professions Code section 25000[1] and section 105(b)[2], Title 4 of the California Administrative

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[1]Section 25000 provides:

"Each manufacturer, importer, and wholesaler of beer shall file and thereafter maintain on file with the department, in triplicate and in such form as the department may provide, a written schedule of selling prices charged by the licensee for beer sold and distributed by him to * * * *his customers in California,* except that the transfer of beer between wholesalers who sell the same brand in package is permitted without filing the schedule of selling prices."

[2]Section 105(b) states:

"Each manufacturer, importer, or wholesaler of beer shall file a price schedule for each county in which his customers have their premises, whether the price which is posted is f.o.b. or delivered, or both. Trading areas within a county must be based on natural geographical differences justifying different prices and shall not be established for special customers."

Code; i.e.; failure, as a wholesaler of beer, to file with the department a schedule of the selling prices for beer sold by him to customers in California.

COUNTS II AND III:

It was determined that the licensee violated Business and Professions Code section 25000.5[3], for selling beer, as a wholesaler, without having a territorial agreement with the manufacturer that the brands in question could be distributed by him in Butte and Santa Cruz counties. The statute further requires that a copy of the agreement be filed with the department. The licensee stipulated that no such agreement was filed with the department.

COUNT IV:

The department determined that appellant violated section 25004[4] since, as a wholesaler, he sold beer at a price less than the schedule of prices filed with the department.

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[3]Section 25000.5 provides:

"(a) Every beer manufacturer, whether located within or without the state, who sells and distributes beer in this state shall designate territorial limits in the state within which the brands of beer manufactured by him may be sold by wholesalers of beer to retail licensees.

"(b) A wholesaler of beer shall not file a written schedule of selling prices to be charged by that licensee for any brand of beer unless he has first entered into a written agreement, with the manufacturer of that brand, which sets forth the territorial limits within which the brand shall be distributed by the wholesaler. A copy of such agreement, and any amendments thereto, shall be filed with the department."

[4]Section 25004 provides:

"Upon the filing of an original schedule of prices and after the effective date of any schedule of amendatory prices, all prices therein stated shall be strictly adhered to by the filing licensee, and any departure or variance therefrom by a licensee is a misdemeanor, *except that the transfer of beer between wholesalers who sell the same brand in package is permitted*

In *Rice* v. *ABC Appeals Board and Corsetti,* 21 Cal.3d 431, supra, the California Supreme Court declared the retail price maintenance provisions of Business and Professions Code section 24755, pertaining to distilled spirits, invalid. Subsequently, an appellate court, in *Capiscean Corporation* v. *ABC Appeals Board and Department of ABC,* 87 Cal.App.3d 996, supra, declared the price maintenance provisions set forth in Business and Professions Code section 24862, concerning wine, invalid because they differed from the price maintenance provisions relating to distilled spirits only in the type of beverage and the precise language of the respective sections, and that the impact of the restrictions is identical.

An appellate court in the recent case of Midcal Aluminum, Inc., v. Rice, 90 Cal.App.3d 979,[5] based on *Rice* and *Capiscean,* supra, held that the wine price maintenance provisions of the Business and Professions Code (Business and Professions Code section 24850 et seq.) violate the Sherman Anti-Trust Act and are thus invalid. This included Section 24862 of said code, which prohibited the selling of wine to a retailer (as well as to a consumer) at a price less than the selling price contained in an effective price schedule or in an effective fair trade contract; and section 24866, which required filing with the department a schedule of selling prices of wine to retailers or consumers,

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without filing the schedule of selling prices. Each sale or transaction involving a violation of posted prices under this chapter is but a single offense or violation of this chapter regardless of the number of articles covered by the sale or transaction."

[5]Petition for hearing pending before the California Supreme Court.

which is not governed by a fair trade contract. The court stated it did not find the provisions of the fair trade laws relative to wholesale price maintenance different from those relative to retail price maintenance and that the price posting provisions also resulted in price fixing.

We note that paragraph (b) of Section 25000.5 is, in effect, a continuation of section 25000 (filing a schedule of selling prices for beer), since it provides that the requirements under the latter statute cannot be accomplished by a wholesaler unless he has first entered into a written agreement with the manufacturer of the brand which sets forth the territorial limits within which the brand shall be distributed by the wholesaler. As the court noted in *Midcal,* supra, with respect to wine (section 101(g), 4 California Administrative Code), only one person may file minimum price schedules for the same brand of malt beverage for the same trading area (section 90, Title 4, California Administrative Code). Furthermore, the price at which a malt beverage is sold at *retail* may vary between trading areas (Section 90, Title 4 of the California Administrative Code).

In view of the foregoing, Business and Professions Code sections 25000, 25000.5, 25004 and section 105(b), Title 4 of the California Administrative Code, supra, relating to malt beverages, would also appear to be invalid as being part of a scheme to fix prices, however, this board is prohibited from declaring said provisions invalid by reason of Article III, section 3.5 of the California Constitution. Because thereof, the department's decision is affirmed as to Counts I through IV.

COUNT V:

The department determined that the appellant-wholesaler delivered malt beverages to premises which had not been issued a valid permit or alcoholic beverage license, thereby violating or permitting a violation of Business and Professions Code section 23355 or 24040. It is argued that these provisions do not prevent a wholesaler from making deliveries of liquor at places other than its own warehouse, nor prohibit a distributor from meeting a retailer at a convenient location and making delivery there. Business and Professions Code section 23355 provides:

> "Except as otherwise provided in this division and subject to the provisions of Section 22 of Article XX of the Constitution, the licenses provided for in Article 2 of this chapter authorize the person to whom issued to exercise the rights and privileges specified in this article and no others *at the premises for which issued during the year for which issued* * * *" (Emphasis added).

The record establishes that the appellant, a licensed wholesaler in San Francisco, had made arrangements with a licensed retailer in Capitola to meet and deliver malt beverages to the latter at a hardware store located at 855 Park Avenue, in San Jose. Since the retailer was not there, appellant's representative left the malt beverages at this address. It is presumed they were picked up by the retailer, as he subsequently paid for same. It is clear that the appellant, a licensed wholesaler, did not personally violate section 23355, which is only concerned with a person other than the licensee exercising the rights and privileges of a licen-

see. Moreover, for the licensee to have permitted another individual to exercise the privileges of a licensee, the conduct must have occurred at the licensed premises. Furthermore, the record is devoid of evidence as to the functions of a licensee which appellant permitted the operators of the hardware store to perform. The appellant did not intend to deliver beer to such persons; delivery was intended for a licensee in Capitola. The facts establish no more than an interruption of this intended delivery. We thus conclude that there is not substantial evidence in the record to establish that appellant permitted another person to exercise the privileges of a licensee in violation of Business and Professions Code section 23355.

Appellant was also determined to have violated or permitted a violation of Business and Professions Code section 24040 because of the above conduct. It states:

> "Each license shall be issued to a specific person and, except in the case of licenses authorizing the sale of alcoholic beverages on trains or boats, or the service of alcoholic beverages on airplanes shall be issued for a specific location, the principal address of which shall be indicated on the license. Except as provided in section 24044, any license issued for a specific location shall be placed in use at that location within 30 days of the date of issuance."

A mere reading of the statute precludes its applicability to the licensed appellant herein.

Based on the foregoing, Ct. V is reversed. A separate penalty having been imposed as to each count, there is no

need to remand this matter to the department for reconsideration of the penalty. Counts I through IV are affirmed.

Peter M. Finnegan, Chairman
Alcoholic Beverage Control
Appeals Board

Member concurring:
Jacob F. West

Appendix F

Price Schedule Statutes In Other States

ARIZONA—Revised Statutes, Section 4-252

CONNECTICUT—General Statutes, Section 30-63

DELAWARE—Code, Article 4, Section 508

FLORIDA—Statutes, Section 565.15

HAWAII—Revised Statutes, Section 281-43

KANSAS—Statutes, Section 41-1113, 41-1114

MARYLAND—Code, Article 2B, Section 109(c)

MASSACHUSETTS—General Laws, Chapter 138, Section 25B

MINNESOTA—Statutes, Section 340.983

NEBRASKA—Revised Statutes, Section 53-168.02

NEW JERSEY—Statutes, Section 33:1-93

NEW MEXICO—Statutes, Section 46-13-1, 46-13-5

NEW YORK—Consolidated Laws, Section 101-b

OKLAHOMA—Statutes, Title 37, Section 536

Appendix G

In the
Court of Appeal of the State of California
in and for the
Third Appellate District

3 Civil 17992

Midcal Aluminum, Inc.,

vs.

Baxter Rice; California Retail Liquor Dealers Assn.

[Filed May 29, 1979]

BY THE COURT:

Intervenor's application for stay of issuance of peremptory writ of mandate is granted. Issuance of the writ is stayed until June 28, 1979.

Dated: May 29, 1979

Puglia, P. J.

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Appendix H

In the
Court of Appeal of the State of California
in and for the
Third Appellate District

3 Civil 17992

Midcal Aluminum, Inc.

vs.

Baxter Rice

[Filed June 27, 1979]

BY THE COURT:

Intervenor's request to extend stay order of May 29, 1979, is granted. Issuance of the peremptory writ of mandate is stayed until July 20, 1979.

Dated: June 27, 1979.

Puglia, P. J.

cc: Damrell, Damrell & Nelson
Attorneys at Law
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Los Angeles, CA. 90036

cc: George Roth
Deputy Attorney General

cc: William T. Chidlaw
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Appendix I

Supreme Court, Appellate Division,

Second Department.

Dec. 11, 1978

In the Matter of William J. Mezzetti Associates, Inc.,

Petitioner,

vs.

State Liquor Authority of the State of New York,

Respondent.

Before SUOZZI, J. P., and GULOTTA, SHAPIRO and MARGETT, JJ.

MEMORANDUM BY THE COURT

Proceeding pursuant to CPLR article 78 *inter alia* to review a determination of the State Liquor Authority which, after a hearing, found that petitioner had violated section 101-bbb (subd. 5) of the Alcoholic Beverage Control Law, suspended its retail store license for a certain period and forfeited its bond in the sum of $1,000.

Determination confirmed and proceeding dismissed on the merits, without costs or disbursements.

Section 101-bbb of the Alcoholic Beverage Control Law falls well within the intended scope of the Twenty-first Amendment to the United States Constitution and consti-

tutes State action which does not conflict with the Sherman Antitrust Act (see *Matter of Theodore Polon, Inc. v. State Liq. Auth.*, 59 A.D.2d 946, 399 N.Y.S.2d 469). We have considered petitioner's other contentions and find them to be without merit.

GULOTTA, SHAPIRO and MARGETT, JJ., concur.

SUOZZI, Justice Presiding, concurs in the result, with the following memorandum:

The majority holds that section 101-bbb of the Alcoholic Beverage Control Law falls within the scope of the Twenty-first Amendment to the United States Constitution and constitutes State action which does not conflict with the Sherman Antitrust Act. In so holding, the majority relies upon a prior decision of this court (*Matter of Theodore Polon, Inc. v. State Liq. Auth.*, 59 A.D.2d 946, 399 N.Y.S.2d 469).

I concur in the result reached by the majority solely on constraint of *Polon*. However, it is my view that section 101-bbb of the Alcoholic Beverage Control Law is violative of the Sherman Antitrust Act and, in that regard, I agree with the well-reasoned opinion of the Supreme Court of California in *Rice v. Alcoholic Beverage Control Appeals Bd.*, 21 Cal.3d 431, 146 Cal.Rptr. 585, 579 P.2d 476, which struck down a statute virtually identical to the one at bar as violative of the Sherman Antitrust Act.